[redacted]

(30,653)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 187

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, PLAINTIFF IN ERROR,

vs.

STATE OF WASHINGTON

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

	Original	Print
Record from superior court of Thurston County	1	1
Bill of complaint	1	1
Exhibit A—Quarantine order No. 4	7	4
Order to show cause why temporary injunction should not issue	13	8
Demurrer	15	9
Affidavit of E. Kevin	16	9
Affidavit of E. I. Jones	17	10
Motion to strike and to make more definite and certain	18	10
Bill of particulars	19	11
Answer	21	11
Memorandum opinion, Wilson, J	25	13
Decree	27	15
Stipulation re statement of facts	29	15
Notice of appeal	30	16
Motion to suspend judgment	31	16
Bond on appeal (omitted in printing)	33	17

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 21, 1925

	Original	Print
Acknowledgment of service of defendant's proposed statement of facts	35	17
Stipulation re service of statement of facts	36	18
Clerk's certificate	37	18
Statement of facts	39	18
Colloquy between court and counsel	39	18
Testimony of S. J. H. French	44	21
F. H. Gloyd	49	25
R. R. White	57	30
Trevor Kincaid	64	35
Peter J. O'Gara	78	44
Wyatt W. Jones	85	48
Charles L. Robinson	92	53
F. H. Gloyd (recalled)	101	59
Harry Sabin	103	60
Silas L. Smith	113	67
Mr. French (recalled)	119	72
Colloquy between court and counsel	121	73
Judge's certificate to statement of facts	123	73
Proceedings in supreme court of Washington	124	74
Opinion, Parker, J	124	74
Judgment	143	91
Petition for writ of error	144	91
Bond on writ of error (omitted in printing)	148	93
Assignment of errors	150	93
Order allowing writ of error	154	96
Praecipe for transcript of record	155	97
Exhibit in Evidence—Quarantine order No. 4	156	97
Writ of error	163	103
Citation and service (omitted in printing)	165	104
Acknowledgment of service of writ of error papers	167	104
Clerk's certificate	168	105

[fol. 1] **IN SUPERIOR COURT OF THURSTON COUNTY, WASHINGTON**

No. 8993

STATE OF WASHINGTON, Plaintiff,

v.

OREGON-WASHINGTON RAILWAY & NAVIGATION COMPANY, a Corporation, Defendant

BILL OF COMPLAINT—Filed May 14, 1923

Comes now the plaintiff and for cause of action alleges:

I

That during all the times herein mentioned the defendant was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of (Washington), Oregon and engaged in maintaining and operating lines of railroad in the states of Idaho, Oregon and Washington, and in Thurston County, Washington, as a public carrier for hire.

II

That at all times since June, 1921, and prior thereto, there has existed and now exists in the areas of the states of Utah, Idaho, Wyoming, Oregon and Nevada, hereinafter set forth, an injurious insect popularly called the alfalfa weevil, and scientifically known as the Phytonomus posticus, which said insect feeds upon the leaves and foliage of the alfalfa plant, as a result of which crops of alfalfa are, where such insects exist in large numbers, greatly damaged or totally destroyed; that said insect multiplies rapidly and is propagated by means of eggs deposited by the female insect upon the leaves and stalks of the alfalfa plant; that when the alfalfa plant is cured, the eggs cling to and remain dormant upon the cured alfalfa hay and [fol. 2] even in the alfalfa meal, when such hay is converted into meal, and such eggs and live weevils are likely to be carried to any point where such alfalfa hay is transported, such eggs there to germinate and the alfalfa weevil there to be distributed and propagated, and that as a result thereof, the curing of alfalfa hay infected with the said alfalfa weevil, and the transporting of such hay and the meal made therefrom to localities theretofore free from such weevil, may, and commonly does, result in the infection with said weevil of the alfalfa crops at the points to which such alfalfa hay and meal is transported. That when said alfalfa hay and meal produced from crops of alfalfa infected with alfalfa weevil is transported in common box cars such as are commonly used upon the

several railroads in the state of Washington, including defendant, and not placed in sealed containers, said meal and the hay and the dried leaves and foliage therefrom containing said eggs and live weevils is likely to be shaken out and distributed along the route taken by the freight cars in which the same is conveyed and said pest communicated to the agricultural lands adjacent to the said routes as a result of the germination of the eggs of the alfalfa weevil upon the hay falling from such freight cars and the falling out of said live weevils. That a proper inspection to ascertain the presence of such weevil eggs in carloads of alfalfa hay or meal would require that every bale of hay and sack of meal contained in such carload or consignment be torn open and a careful inspection made of the stalks and leaves of such alfalfa, and such meal, which method of inspection is necessarily prohibitive in cost and wholly impracticable, and that hence the only practical method of preventing the spreading of the said alfalfa weevil pest into uninfested districts is to prohibit the transportation of alfalfa hay or meal from the district in which the said alfalfa weevil exists; that said alfalfa weevil is new to and not generally distributed within [fol. 3] the state of Washington. That there is no known method of ridding a district infected with such alfalfa weevil of such pest and that when a district is once infested therewith it always remains thus infested.

III

That subsequent to June 8, 1921, and prior to September 17, 1921, information was received by the Director of Agriculture of the State of Washington that there was a probability of the introduction of such alfalfa weevil into the State of Washington and across the boundaries thereof, and the said Director of Agriculture did thereupon proceed thoroughly to investigate said insect and the areas where such pest existed, and from such investigation, did ascertain that such pest existed and was dangerously injurious to alfalfa in the whole of the state of Utah, all portions of the state of Idaho lying south of Idaho County, the counties of Uinta and Lincoln in the state of Wyoming, the county of Delta in the state of Colorado, the counties of Malheur and Baker in the State of Oregon, and the county of Washoe in the State of Nevada, and that the said Director of Agriculture of the State of Washington did thereupon, on or about September 17, 1921, make and promulgate a quarantine regulation and order under the terms of which the said Director of Agriculture did declare and proclaim a quarantine against all of the above described areas and forbid the importation into the State of Washington of alfalfa hay and alfalfa meal (except under the conditions therein contained), and that the said Director of Agriculture did thereupon at once notify the Governor of the State of Washington of such quarantine limits established as aforesaid, and the said Governor of the State of Washington did thereupon approve the same and did thereupon issue his proclamation proclaiming the boundaries of such quarantine as fixed in said order and the nature thereof and the order, rules and regulations prescribed for the main-

tenance and enforcement thereof, and did thereupon duly publish [fol. 4] said proclamation by causing the same to be filed in the office of the Secretary of State of the State of Washington, and by causing copies thereof to be transmitted to each of the railroad companies doing business in the State of Washington, and by causing a summary thereof to be published in various newspapers published in the State of Washington, such publication being deemed sufficient and expedient to give proper notice of such quarantine order, and that at all times since said September 17, 1921, said quarantine order and regulation has been and now is in full force and effect, and at all times since September 17, 1921, the defendant has had actual notice of such quarantine order and regulation. That a true copy of said quarantine order is hereto attached, marked "Exhibit A," and made a part hereof.

IV

That during the months of January, February, March and April, 1923, the defendant, well knowing of the existence and promulgation of said quarantine order hereinabove described, and in total disregard and violation thereof, caused to be shipped into the State of Washington in common box cars and not in sealed containers, a large number, to-wit: approximately one hundred car loads of alfalfa hay, all of which said alfalfa hay was consigned and shipped, with the knowledge of the defendant, from various points in the State of Idaho lying south of Idaho County in said state of Idaho, and through the state of Oregon and into the State of Washington in direct violation of said quarantine order hereinabove set forth, and that unless the defendant is enjoined and restrained from so doing, said defendant will continue so to ship alfalfa hay from such quarantined area of the state of Idaho into and through the State of Washington.

That large quantities of alfalfa are grown and produced in the eastern and central portions of the State of Washington and adjacent [fol. 5] to the railroad lines of defendant and particularly the lines of the defendant and other railroads in the State of Washington over which such shipments of alfalfa hay were shipped and are likely to be shipped in the future, unless an injunction is issued as prayed for in this complaint, and that unless said defendant is enjoined and restrained from continuing to ship such alfalfa hay into the state of Washington from such quarantined areas, the districts where alfalfa is grown in the State of Washington is likely to and will become infested with such alfalfa weevil pest to the great and irreparable damage of the citizens and residents of the state of Washington engaged in growing and producing alfalfa therein.

V

That neither the plaintiff, nor the citizens of the state of Washington engaged in the growing and production of alfalfa have any plain, speedy or adequate remedy at law.

Wherefore, Plaintiff prays for judgment against the defendant perpetually restraining and forbidding the defendant, its agents, officers

or employees, or any of them, from transporting into the state of Washington (or through said state except in sealed containers) any alfalfa hay or any other products forbidden to be imported into the state of Washington by said quarantine order from the areas covered and described in said quarantine order.

Plaintiff further prays that an order be forthwith entered by this court requiring the defendant to show cause, if any it has, at a time and place to be fixed by said order, why the defendant, its officers, agents and employees and each and all of them, should not, during the pendency of this action and until the further order of this court, be restrained, forbidden and enjoined from transporting or causing to be transported into the State of Washington (or through said state except in sealed containers) from said areas covered by said quarantine order, any alfalfa hay or other products named and described in said quarantine order.

[fol. 6] Plaintiff further prays for such other and further relief as to the court may seem meet and equitable in the premises, and for its costs and disbursements herein.

John H. Dunbar, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Plaintiff.

Sworn to by F. H. Gloyd. Jurat omitted in printing.

[fol. 7] EXHIBIT "A" TO BILL OF COMPLAINT

Quarantine Order No. 4, Pertaining to Alfalfa Weevil

Whereas, It has become known to me that an injurious insect, popularly called the alfalfa weevil, and scientifically known as "Phytonomus posticus," exists and is dangerously injurious to alfalfa in the State of Utah, and in many of the counties of the southern part of Idaho, and in certain counties in the state of Wyoming, to-wit: Uinta and Lincoln; and a certain county in the State of Colorado, to-wit: Delta; and in certain counties in the State of Oregon, to-wit: Malheur and Baker; and in Washoe County, Nevada.

Now, therefore, I, E. L. French, Director of Agriculture of the State of Washington, under and by virtue of the authority conferred upon me by Chapter 105. Session Laws of 1921, do hereby declare and proclaim a quarantine against said state of Utah, and all portions of the State of Idaho lying south of Idaho County, and the counties of Uinta and Lincoln in the State of Wyoming; and the county of Delta in the State of Colorado and the counties of Malheur and Baker in the State of Oregon, and the county of Washoe in the state of Nevada, and forbid the importation into Washington of the following agricultural products and other articles, excepting under conditions and regulations as specified.

1. Alfalfa hay and other hays of all kinds and cereal straws, excepting the material known locally in Utah as salt grass packing hay, which shall be admitted into Washington provided that such material be cut only between the dates of October 1, and April 1, and that the

raking, shocking, stacking, baling or shipping of this material as commercial product be allowed only after the maximum temperature of the season has fallen below sixty degrees Fahrenheit. Provided [fol. 8] further that a certificate be required from the Crop Pest Inspector of the State of Utah showing that these requirements have been met, which certificate shall accompany each shipment. Provided further that no salt grass packing hay shall be held over in to the field from one season to another. The use of salt grass hay as a packing material in shipments of fruit, crockery and other materials is permitted, provided said salt grass hay has been cut and removed from the field between October 1, and April 1, as above specified and stored in warehouses, removed from alfalfa fields, alfalfa hay or other suspected materials.

2. Alfalfa meal or other finely ground products made from alfalfa hay, providing that the grinding of such products shall be done between the dates of October 1, and April 1, may be admitted under the following provisions:

(See A Below B)

(*b*) That the product shall be stored in warehouses, removed from alfalfa fields, alfalfa hay, or other suspected materials immediately after being ground, until shipped or otherwise disposed of.

(*a*) That all such products shall be sacked and shipped in new, clean sacks.

(*c*) Provided further that shipments of alfalfa meal or other such ground products designated for the state of Washington shall come only from such points as *designed* by the recognized State Crop Pest Inspector Officers of the State shipping into Washington, said officers to notify the Department of Agriculture of Washington at Olympia by registered mail or by telegraph of the destination of all shipping points in the aforesaid quarantined territory, said notification to be sent before any shipments are made into the State of Washington from said designated points.

(*d*) All warehouses and places where said product is stored to be [fol. 9] at all times free of alfalfa hay, other hays, straw and all other means of contamination.

(*e*) Each lot shipment shall bear an official certificate of the state from which the shipment originates, stating that it has been inspected and passed in compliance with these regulations, and stating where it was ground, stored, inspected, and point of shipment.

3. Fresh fruits and vegetables, exclusive of potatoes, excepting under the following regulations:

(*a*) Shipments for Washington to be made only from points designated by the recognized State Pest Inspection Officers of the State shipping into Washington, said officers to notify the Department of Agriculture of Washington, at Olympia, by registered mail

or by telegraph of the designation of all shipping points in the aforesaid state of Utah, or all portions of the State of Idaho lying south of Idaho County; or Counties of Uinta and Lincoln in Wyoming and the county of Delta in Colorado; and the counties of Malheur and Baker in the State of Oregon; and the county of Washoe in the State of Nevada; said notice-citation to be sent and its receipt to be acknowledged before any shipments are made to the State of Washington from said designated points.

(*b*) Shipments to be repacked from orchard or field boxes into new, clean boxes, or other fresh containers.

(*c*) All wagons or other conveyances used in hauling to the place where repacking is conducted to be kept from alfalfa hay or other hays, straw, and other means of contamination.

(*d*) All packing houses to be at all times free of alfalfa hay, other hays, straw, and other means of contamination.

(*e*) Each lot shipment shall bear an official certificate of the State from which the shipment originates stating that it has been inspected and passed in compliance with these regulations and stat- [fol. 10] ing where it was repacked and inspected.

4. Potatoes unless accompanied by an official certificate signed by the recognized State Pest Inspection Officer of the State from which such shipments of potatoes originated, setting forth that the potatoes have been passed over a screen, placed in fresh, clean sacks and packed in cars that are free from alfalfa hay or other means of contamination.

5. All nursery stock, unless accompanied by a special certificate setting forth that such nursery stock has been fumigated from the alfalfa weevil in an airtight enclosure subsequent to being boxed, baled or packed for shipment, with cyanide of Potassium or cyanide of sodium at the rate of one ounce to each one hundred cubic feet of enclosed spaced.

6. That no shipment of household or emigrant's movables originating in any state or county designated as infested with the alfalfa weevil shall be brought into the State of Washington by any common carrier, person or persons, unless such shipments be accompanied by a copy of a sworn statement made in duplicate by the owner or shipper after the following forms or blanks which will be furnished to applicants by the Department of Agriculture at Olympia, Washington, Copy No. 1 to be mailed to the State Department of Agriculture at Olympia, Washington, and Copy No. 2 to be delivered to the common carrier agent, with a special certificate appended, to attach to waybill.

STATE OF ——,
County of ——, ss:

I hereby solemnly swear that I was present during the preparation for shipment of the household or emigrants' goods which this affi-

davit accompanies; that the goods were delivered to the (Railroad) at —— (Station), on —— —, —— (month, day, year), constituting (less than) a carload (if carload, write initials and car No. here.) ——, to be shipped to (Name of Consignee) —— ——, at (Destina-[fol. 11] tion) via (give initials of other line); that no nursery stock, vegetables or fruit is included in the shipment and that no hay or straw (except as provided for under Part No. 1 of this quarantine) is included for packing material, or any other purpose, except as food necessary for the livestock in transit to the Washington State line; that the shipment is made up of the following: Household goods, farm implements, tools, harness, farm wagons, automobiles, stands of bees, livestock (draw a line through items not included) — (Specify) — feed for animals in transit (Specify kinds and amount of each) and (Specify any items not included in previous classification.)

—— ——, Shipper or Owner.

Subscribed and sworn to before me, —— ——, a notary Public in and for the State of ——, County of ——, this — day of ——, 19—. —— ——, Notary Public. My Commission expires —— —, 19—.

The special certificate from the owner or shipper to be appended to Copy No. 2 of the sworn statement shall be after the following form:

I hereby agree to observe explicitly the requirements of the Washington Quarantine Order with regard to hay or straw included as stock feed for use before reaching the Washington State line; household and emigrants' goods and other materials, and hereby certify that I have mailed this day one copy of the foregoing affidavit to the State Department of Agriculture, Olympia, Washington.

—— ——, Signature.

6. All railway shipments of livestock unless shipped in cars that are free of alfalfa hay all other hays and cereal straws throughout all that portion of the journey that is within the State of Utah, and all portions of the State of Idaho lying south of Idaho County, and counties of Uinta and Lincoln in Wyoming, and the county of [fol. 12] Delta in Colorado; and the counties of Malheur and Baker in the State of Oregon, and the county of Washoe in the State of Nevada.

All Horticultural inspectors of the State of Washington are hereby instructed and required to refuse admission into the State of Washington of all such articles as are herein designated from said State of Utah, and all portions of the State of Idaho lying south of Idaho County, and the Counties of Uinta and Lincoln in Wyoming; and the county of Delta in Colorado; and the counties of Malheur and Baker in the State of Oregon, and the county of Washoe in the State of Nevada, except under the conditions herein enumerated. If any such articles are as hereinbefore listed come into the state of Wash-

ington in violation of this quarantine they must be at once destroyed or returned to the shipper at his expense.

Any violation of these orders will be dealt with according to law.

This quarantine order to take effect on and after this date.

(Signed) E. L. French, Director of Agriculture.

Dated September 17th, 1921, Olympia, Washington.

[fol. 13] [File endorsement omitted.]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ORDER TO SHOW CAUSE WHY TEMPORARY INJUNCTION SHOULD NOT ISSUE—Filed May 14, 1923

This matter having come regularly on for hearing upon the application of plaintiff for an order restraining and forbidding the defendant, its servants, agents or employees, during the pendency of this action, from transporting any alfalfa hay into the State of Washington, or through said state except in sealed containers, from certain areas in the State of Utah, Idaho, Wyoming, Nevada and Washington, (Oregon), and the court having duly considered said application and the files and records herein. Now, therefore, it is hereby

Ordered that the defendant be and appear before this court in department No. one thereof, in the Thurston County court house, at Olympia, Thurston County, Washington, on Friday the 25th day of May, 1923 at the hour of 10:00 o'clock A. M., and then and there to show cause, if any it has, why an order should not be entered herein forbidding and restraining the defendant, its officers, agents, servants, and employees and each and all of them, during the pendency of this action and until the further order of the court, from transporting any alfalfa hay into the State of Washington, or through said state except in sealed containers, from the state of Utah, all portions of the State of Idaho lying south of Idaho County, the counties of Unida and Lincoln in the State of Wyoming, the county of Washoe in the state of Nevada, and the Counties of Machem and Baker in the State of Oregon, or any shipments of such alfalfa hay consigned [fol. 14] from or originating in any of said areas.

It is further ordered that a certified copy of this order be served upon the defendant in the manner prescribed for the service of summons in civil actions not less than eight days prior to the said day fixed for said hearing.

Done in open court this 14th day of May, 1923.

D. F. Wright, Judge.

[fol. 15] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

DEMURRER—Filed May 25, 1923

Comes now the defendant, and demurs to the complaint herein, upon the ground that it appears upon the face thereof that said complaint does not state facts sufficient to constitute a cause of action.

Bogle, Merritt & Bogle, Attorneys for Defendant.

[fol. 16] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

AFFIDAVIT OF E. KEVIN—Filed May 25, 1923

STATE OF WASHINGTON,
County of Thurston, ss:

E. Kevin, being first duly sworn, on oath, deposes and says: That he is agent for the Oregon-Washington Railroad & Navigation Company, a corporation, at Olympia, Thurston County, Washington; That he has been reliably informed, believes, and alleges the facts to be that the above named defendant has made no shipments of alfalfa hay from the alleged infected districts mentioned and described in the complaint on file herein destined to points in the State of Washington, since September 17th, 1921; that a total of 61 cars, comprising all the shipments from said alleged infected district since September 17th, 1921, were transported through the State of Washington destined for points in northern Idaho, but that each and every shipment made up of said cars was duly and regularly inspected by the constituted authorities at the originating point, and was accompanied by regular certificates of inspection showing the same to be free from alfalfa weevil and the eggs of said insect.

E. Kevin.

Subscribed and sworn to before me this 25th day of May, 1923. George B. Bigelow, Notary Public in and for the State of Washington, Residing at Olympia.

[fol. 17] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

AFFIDAVIT OF E. I. JONES

STATE OF WASHINGTON,
County of King, ss:

E. I. Jones, being first duly sworn, on oath, deposes and says: That he is one of the attorneys for the above named defendant, and has read the complaint of the plaintiff herein; that he has been reliably informed, believes, and alleges the facts to be that the above named defendant has made no shipments of alfalfa hay from the alleged infected districts mentioned and described in the complaint on file herein destined to points in the State of Washington, since September 17th, 1921; that a total of 41 cars, comprising all the shipments from said alleged infected district since September 17th, 1921, were transported through the State of Washington, destined for points in northern Idaho, but that each and every shipment made up of said cars was duly and regularly inspected by the constituted authorities at the originating point, and was accompanied by regular certificates of inspection showing the same to be free from alfalfa weevil and the eggs of said insect.

E. I. Jones.

Subscribed and sworn to before me this 25th day of May, 1923. Lane Summers, Notary Public in and for the State of Washington, Residing at Seattle.

[fol. 18] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

MOTION TO STRIKE AND TO MAKE MORE DEFINITE AND CERTAIN—Filed May 25, 1923

Comes now the defendant herein and moves for an order of the court requiring the plaintiff—

I

To strike paragraph III of said complaint, and the whole thereof, for the reason and upon the ground that the attempted action of the plaintiff, acting through its Director of Agriculture as therein set forth, is in contravention and violation of Article I, Section 8, of the Constitution of the United States, it being an attempted unlawful regulation of interstate commerce.

II

In the event the motion to strike said paragraph III of said complaint is denied, defendant moves to make said paragraph III more definite and certain in this, to-wit: that the plaintiff be required to set out the proclamation of the Governor of the State of Washington mentioned in said paragraph, or to furnish defendant with a bill of particulars containing said proclamation.

Bogle, Merritt & Bogle, Attorneys for Defendant.

Copy of attached motion received and due service thereof admitted upon May 25, 1923.

John H. Dunbar and R. G. Sharpe, Attorneys for Plaintiff.

[fol. 19] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

BILL OF PARTICULARS—Filed June 9, 1923

Comes now the plaintiff and in compliance with the order of the above court requiring plaintiff to furnish a bill of particulars as to the allegations of paragraph III of the complaint, says:

That the Governor of the State of Washington proclaimed the boundaries of the quarantine as fixed in the order of the director of agriculture as alleged in said paragraph III by endorsing upon the original quarantine order words to the effect that said order was approved followed by the official signature of the Governor, and by causing the same to be filed in the office of the Secretary of State of the State of Washington, and causing a copy of said quarantine order to be mailed to each of the companies operating lines of commercial railroad in the State of Washington, and to each of the express companies doing business in the State of Washington, and to each of the Horticultufal District Inspectors of the State of Washington.

John H. Dunbar, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Plaintiff.

[fol. 20] Sworn to by C. L. Robinson. Jurat omitted in printing.

[fol. 21] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER—Filed June 30, 1923

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, without in any way or manner

waiving the motions and demurrer on file herein, and for answer to the complaint herein, alleges and denies as follows:

I

Defendant denies each and every allegation, matter and thing contained in the complaint except as herein expressly admitted.

II

Answering paragraph I of said complaint, defendant denies that it is a corporation organized and existing under the laws of the State of Washington, and alleges that it is a corporation organized and existing under and by virtue of the laws of the State of Oregon.

III

Answering paragraph II of said complaint, defendant denies any knowledge or information thereof sufficient to form a belief as to any allegation, matter or thing therein contained, and therefore denies the same.

[fol. 22] IV

Answering paragraph III of said complaint, defendant denies any knowledge or information thereof sufficient to form a belief as to any allegation, matter or thing therein contained, and therefore denies the same.

V

Answering paragraph IV of said complaint, defendant denies each and every allegation, matter and thing therein contained.

VI

Answering paragraph V of said complaint, defendant denies each and every allegation, matter and thing therein contained.

As a first, further and affirmative answer and defense, defendant alleges:

That the attempted action of plaintiff acting through its Director of Agriculture, as set forth in plaintiff's complaint, is in contravention and violation of Section 8, Article 1 of the Constitution of the United States, and is an attempted unlawful regulation of interstate commerce by the plaintiff.

As a second, further and affirmative answer and defense, defendant alleges:

That Chapter 105 of the Laws of 1921 of the State of Washington is, and each and every section thereof are, in contravention and violation of Section 8, Article I of the Constitution of the United States.

As a third, further and affirmative answer and defense, defendant alleges:

That Quarantine Order No. 4, referred to in the complaint as Exhibit A", is void and is in contravention and violation of Section [fol. 23] 8 Article I of the Constitution of the United States.

As a fourth, further and affirmative answer and defense, defendant alleges:

That Quarantine Order No. 4, referred to in the complaint herein as "Exhibit A", is in contravention and violation of Chapter 105 of the Laws of 1921 of the State of Washington.

As a fifth, further and affirmative answer and defense, defendant alleges:

That Chapter 105 of the laws of 1921 of the State of Washington, and Quarantine Order No. 4 referred to in the complaint herein as "Exhibit A", are, and each of them is, in contravention of and in conflict with the Act of August 20, 1912, entitled "An Act to regulate the importation of nursery stock and other plants and plant products; to enable the Secretary of Agriculture to establish and maintain quarantine districts for plant diseases and insect pests; to permit and regulate the movement of fruits, plants, and vegetables therefrom, and for other purposes."

Chapter 308, 37 Statutes at Large, 318; and especially section 8 of said act, as amended March 4, 1917; Chapter 179, 39 Statutes at Large, 1165.

Wherefore defendant prays that the plaintiff take nothing by its complaint herein, and that the defendant be hence dismissed, with its costs and disbursements herein.

Bogle, Merritt & Bogle, Attorneys for Defendant.

[fol. 24] Sworn to by W. H. Bogle. Jurat omitted in printing.

[fol. 25] In Superior Court of Thurston County

[Title omitted]

Memo. Opinion—Filed Jul. 2, 1923

The question of law passed upon by the court in overruling the demurrer in this case, in effect, determined the decision of the case on its merits. Much of the evidence introduced by the defendant tending to controvert the facts found by the Director of Agriculture and embodied in the quarantine order made by him, was, I think, improperly admitted and cannot be considered by the court.

The statute itself, Chapter 105 of the laws of 1921, of the State of Washington, provides that the orders, rules and regulations issued by the Director pursuant to this act shall have the force and effect of law and the court having found that the order issued was authorized by the law and in compliance therewith, it will not go beyond

the query whether the subject matter of the act is within the range of the authority of the Department, and having so determined will not revise, correct or nullify the methods and means employed to accomplish the purposes of the law.

In the case of St. Louis v. Southern Railway Co. of Texas, 181 U. S. 250, reading from page 260, Mr. Justice McKenna, for the Court, after reviewing many decisions, stated:

"What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded. And the true purpose of a statute ascertained."

Citing cases. He then continues:

[fol. 26] "But we are not now put to any inquiry of that kind. The good faith and sincerity of the Texas officers cannot be doubted, and the statutes under which they acted cannot be justifiably complained of. The regulations prescribed are complained of, but are they not reasonably adaptive to the purpose of the statutes—not in excess of it! Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against. The necessities of such cases often require prompt action. If too long delayed the end to be attained by the exercise of the power to declare a quarantine may be defeated and irreparable injury done.

It is urged that it does not appear that the action of the live-stock sanitary commission was taken on sufficient information. It does not appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality. In some cases the circumstances would have to be shown to sustain the quarantine, but the presumptions of the law are proof, and such presumptions exist in the pending case, arising from the provisions of and the duties enjoined by the statute and sanction the action of the sanitary commission and the governor of the State."

I think that this language is applicable and controlling of the situation in the case at bar, and for this reason, in addition to those stated at the time of the ruling upon the demurrer, judgment may be entered in favor of the plaintiff, granting the relief prayed for in the complaint.

John M. Wilson, Judge.

[fol. 27] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

DECREE—Filed Jul. 13, 1923

This cause having come regularly on for trial on June 29, 1923, before the court sitting without a jury, the plaintiff being represented by John H. Dunbar, Attorney General, and R. G. Sharpe, Assistant Attorney General, and the defendant being represented by Messrs. Bogle, Merritt & Bogle, and E. I. Jones, Esquire, and the plaintiff having submitted its evidence, and the defendant having submitted its evidence, and arguments of counsel having been heard, and the court being fully advised in the premises, now therefore it is hereby

Ordered, adjudged and decreed that the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, and each and all of its agents officers, and employees, be, and they and each of them are hereby perpetually restrained and enjoined from tr*sna*porting into the state of Washington (or through the state of Washington except in sealed containers) any alfalfa hay consigned or shipped from any portion of the following described areas: All portions of the state of Utah, all portions of the state of Idaho lying south of Idaho County, the counties of Uinta and Lincoln in the State of Wyoming, the county of Delta in the state of Colorado, the counties of Malheur and Baker in the state of Oregon, and the county of Washoe in the state of Nevada.

This decree shall be and remain in full force and effect so long as quarantine order No. 4, made and entered by the department of [fol. 28] agriculture of the State of Washington, approved by the governor of the state of Washington and filed with the secretary of State of said state of Washington on or about September 17, 192], remains in full force and effect, and in the event of said quarantine order being modified or amended, this decree shall thereafter remain in full force and effect in so far as the same is not in conflict with said quarantine order, as so amended or modified.

It is further decreed that the plaintiff do have and recover of and from defendant, its costs and disbursements herein to be taxed.

To all of the foregoing decree, the defendant does hereby except, which exception is hereby allowed.

Done in open court this 13 day of July, 1923.

John M. Wilson, Judge.

O. K. as to form. Bogle, Merritt & Bogle.

[fol. 29] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

STIPULATION RE STATEMENT OF FACTS—Filed Sept. 11, 1923

It is hereby stipulated by and between the parties to the above entitled action, by and through their respective attorneys that the

proposed statement of facts filed in said action, with the proposed amendments thereto, may be settled and signed by the court as amended, this 11th day of September, 1923.

John H. Dunbar, R. G. Sharpe, Attorneys for Plaintiff.
Bogle, Merritt & Bogle, Attorneys for Defendant.

[fol. 30] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed Sept. 8, 1923

To the above-named plaintiff and to John H. Dunbar, Esquire, Attorney General, and R. G. Sharpe, Esquire, Assistant Attorney General, its attorneys herein:

You and each of you will please take notice that the defendant herein hereby appeals to the Supreme Court of the State of Washington from that final judgment made and entered in the above entitled court and cause on the 13th day of July, 1923, and from the whole thereof.

Dated this 8th day of September, 1923.

Bogle, Merritt & Bogle, Attorneys for Defendant.

Copy of attached notice of appeal received and due service thereof admitted upon September 8, 1923.

John H. Dunbar, R. G. Sharpe, Attorneys for Plaintiff.

[fol. 31] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

MOTION TO SUSPEND JUDGMENT—Filed Sep. 8, 1923

Comes now the defendant in the above entitled cause, and moves the court to suspend the operation of the judgment therein and the injunction granted by said judgment, pending an appeal of this cause to the Supreme Court of the State of Washington, upon such terms as to supersedeas bond as to the court may seem meet and proper, and in support of said motion, would respectfully show to the court as follows:

I

That the correctness of said judgment is very doubtful.

II

That the defendant is being deprived of the use of its property and the revenues therefrom, with no means of being compensated for

such loss, in the event of the final decision of this cause being in its favor.

III

That the plaintiff cannot be required to file a bond to protect the defendant against the wrongful suing out of the injunction.

IV

That the testimony and other evidence in this cause shows a disposition on the part of the defendant to co-operate with the plaintiff [fol. 32] and its officers, in so far as it can lawfully do so in the enforcement of its quarantine regulations; and nowhere does it appear that the defendant has transported any alfalfa hay to be delivered at a destination within the State of Washington, the proof showing that all of the shipments complained of were in transit through the state.

V

And for other reasons to be shown to the court of the hearing hereof.

Bogle, Merritt & Bogle, Attorneys for Defendant.

[fols. 33 & 34] Bond on Appeal for $200—Approved and filed Sept. 8, 1923; omitted in printing

---

[fol. 35] In Superior Court of Thurston County

[Title omitted]

Admission of Service of Defendant's Proposed Statement of Facts—Filed September 11, 1923

Due and personal service of the defendant's proposed Statement of Facts in the above entitled case, after filing and receipt of a copy thereof, with the file marks of the Clerk of said Court thereon, is duly admitted this 11th day of September, 1923.

John H. Dunbar, R. G. Sharpe, Attorneys for Plaintiff.

[fol. 36] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

STIPULATION RE SERVICE STATEMENT OF FACTS—Filed Sep. 8, 1923

It is hereby stipulated and agreed by and between the plaintiff and the defendant herein, through their respective attorneys, that the defendant shall have until September 15th, 1923, within which to file and serve its proposed Statement of Facts in this case.

Dated this 6th day of August, 1923.

John H. Dunbar & R. G. Sharpe, Attorneys for Plaintiff.
Bogle, Merritt & Bogle, Attorneys for Defendant.

[fols. 37 & 38] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

CLERK'S CERTIFICATE

STATE OF WASHINGTON,
County of Thurston, ss:

I, Paul Paulk, Deputy County Clerk and Deputy Clerk of the Superior Court, for Thurston County, State of Washington, do hereby certify that the foregoing is a full, true and correct transcript of so much of the original record in the above entitled cause as I am requested by the Appellant to transmit to the Supreme Court.

In witness whereof I have hereunto set my hand and affixed the Seal of said Superior Court, this 20th day of September, 1923.

Paul Paulk, Deputy County Clerk and Deputy Clerk of the Superior Court, Thurston County, Washington. (Seal of Superior Court of Thurston County, Washington.)

[fol. 39] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

Before the Honorable D. F. Wright, Judge Presiding

A. C. Baker, Reporter

STATEMENT OF FACTS—Filed in Supreme Court Sept. 27, 1924; in Superior Court Sept. 11, 1923

The Court: I think the demurrer may be considered as of the time it was filed, and that question may be considered by the Court

first. You may file your answer with the understanding that you will not be prejudiced by so doing.

Mr. Sharp: I do not see why we should be tied down in that way, if Your Honor please. I think we should have a ruling on the demurrer.

The Court: Very well. You may proceed, and I will hear the argument on the demurrer.

(Argument.)

The Court: It appears from the record that the complaint has been amended as to paragraph 2 of the same, and it is understood that the demurrer which is now being considered is filed against the amended complaint, or against the complaint as amended.

(Argument.)

[fol. 40] Whereupon adjournment was taken until Saturday, June 30, 1923, at ten o'clock a. m. Upon reconvening the following proceedings were had:

The Court: Gentlemen, I have read some of these authorities submitted last evening, and considered this complaint, and have gone into the matter rather carefully, and I have come to the conclusion that the demurrer must be overruled. I think the case of Smith v. St. Louis & Southwestern Ry., 181 U. S. 253, is probably controlling. It is a later case than the Missouri case, and distinguishes the Missouri case; there are some things in it that would lead me to think that the Court has enlarged somewhat upon the rulings as made in the Missouri case.

Now they say here on page 255, after citing a number of cases where the court has held with reference to an interference with Interstate commerce, they say: "The exclusion in the case at bar is not as complete as in the cited cases. That, however, makes no difference if it is within their principle; their principle does not depend upon the number of States which are embraced in the exclusion. It depends upon whether the police powers of the State have been exerted beyond its province—exerted to regulate interstate commerce—exerted to exclude without discrimination of the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine.* The words in italics expressed an important qualification. The prevention of disease is the gist of quarantine law and such law is directed not only to the actual disease, but what has become exposed to disease. [fol. 41] Now in this complaint there is an allegation, and I think the territorial limits are sufficiently defined, and there is an allegation that within those territorial limits this destructive insect—these limits are infected with this destructive insect, and it is also alleged that it is impossible to eradicate, impossible to separate and these facts are admitted by the demurrer. This case goes on to say in distinguishing the Husen case, Missouri case. Such a statute the Court held was not a law which interfered with interstate commerce and therefore invalid. At the same time the Court admitted, un-

hesitatingly, that a State may pass laws to prevent animals suffering from contagious or infectious diseases from entering in it. An no attempt was made to say that all Texan or Mexican cattle coming from the malarial districts during the period mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased." That allegation is here in this complaint.

"Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the State by its laws until they are cured of the disease or at least until some mode of transporting them without danger or spreading it is devised."

Now upon the proposition of this being a subject of legislation [fol. 42] covered by the legislation of Congress, I think there is nothing in that contention, for the reason stated by counsel for the State last night, and as pointed out in the case in 211 U. S. that while there is such legislation authorizing the secretary of agriculture to act, there is nothing to show that he ever has exercised his powers under that legislation, and therefore the Federal government has not covered the field, and I also think that upon the porposition of the proclamation, that it does not seem necessary that the proclamation be actually made in order to validate the order of the department.

The law itself provides that it shall become law and have the effect of law, and the purpose of the proclamation is only to give notice which the complaint alleges was given in a different manner. The demurrer will be overruled and exception allowed to the defendant.

Mr. Jones. What does Your Honor say with reference to the legislation as to whether or not it provides for anything more than inspection.

The Court: The third paragraph of the law, the second paragraph defines the powers of the Director of Agriculture and the third paragraph provides for the manner under which those powers shall be exercised. I think under the third paragraph, sec. 2782 Remington's Code, there is ample authority given to the Director of Agriculture to take the course he has taken here and promulgate the order that he has promulgated for the reason that it appears that an inspection is practically impossible, and inspection would not prevent the evils [fol. 43] which it seeks to check here; and that brings us back to the other proposition that I have already stated, that the police powers of the State are sufficiently broad to cover all of the necessities of the people of the state and unless that were the law I cannot see how a case of this kind, which is an outstanding case, there is nothing in my scope of knowledge which has presented just such a situation as this is, the proposition of diseased cattle is a very different proposition from this, and, unless the police power may be extended to meet situations as they arise, why, it would be futile and the State would be helpless to protect its people against an invasion such as this. I think there is ample authority to warrant the order made.

Mr. Jones: The court will allow exception?

The Court: Exception allowed.

Mr. Sharp: I would like the complaint amended in one respect. Through inadvertence of the stenographer she wrote in the word "Washington" in the first paragraph, in which it is alleged the defendant is a Washington corporation. The defendant has set forth in its answer that it is an Oregon corporation, and I knew that before, but there was a mistake made.

Mr. Jones: And we have set out in the answer, "Comes now the Oregon Railway and Navigation Company, a corporation, without in any way waiving the motion pending here". I wish that part stricken.

The Court: That may be done, and your amendment may be allowed, Mr. Sharp.

[fol. 44] S. J. H. FRENCH, being a witness called on behalf of the plaintiff after having been first duly sworn, testified as follows:

Direct examination by Mr. Sharp:

Q. State your name.

A. S. J. H. French.

Q. What position do you hold?

A. Special rate and traffic agent of the O. W. R. R. & N. at Portland.

Q. That is the defendant in this action, is it not?

A. Yes.

Q. Where is your place of business?

A. Portland, Oregon.

Q. Mr. French, did you have occasion to go over a list of consignments on board cars over your line that I hand you?

A. Yes, this statement was checked against the waybills, duly audited and filed in our auditor's office at Portland, and with the additional notations were made as marked on the waybills to complete the statement.

Mr. Sharp: I asked that this be admitted in evidence and marked as plaintiff's Exhibit E.

Mr. Jones: We have no objections if the State will furnish us with a copy. That is our copy.

Mr. Sharp: We will furnish you with a copy.

The Court: Is that the original?

Mr. Sharp: No, this was furnished by Mr. Jones. We introduced one at the other hearing, and this is our copy. There is one in evidence. * * *

The Court: Well, it may be understood that a copy will be substituted for this, and you may have this. What is the nature of it?

Mr. Sharp: This is a statement of certain shipments made over the Oregon Washington Railroad and Navigation Company from points [fol. 45] in Idaho to various other points, showing the waybills, car initials, date of shipment, from point and to what points, shipments were made, consignor and consignee, number of bales of hay con-

tained in the car, each car, the weight and remarks relating to the routing of the car.

The Court: It may be admitted and marked.

(Marked Plaintiff's Exhibit E.)

Mr. Sharp: Now referring to plaintiff's Exhibit E, under the head of date of shipment are certain figures given there with oblique lines between each of the figures. What does that indicate, as you understand it?

A. The day of the month, the fourth day of 1923, January 4, 1923.

Q. The first oblique mark indicates the month?

A. Yes, sir.

Q. The figures between the oblique marks the date of the month?

A. Yes, sir.

Q. And the figures following the second oblique mark indicate the year of the shipment.

A. Yes, the year.

Q. And the column under the word "From" indicates the point of consignment?

A. Point of origin.

Q. And the column under the word "To"?

A. Destination.

Q. Consignor and consignee are self evident. Number of bales, what does that indicate?

A. That means the number of bales, 448 bales, as the case may be, contained in each of the cars.

Q. Contained in each of the cars?

A. In each carload shipment.

[fol. 45½] Q. And under the head "weight" certain figures given, that indicates the pounds?

A. That indicates pounds.

Q. Now in going over these records is there anything to indicate what was done with these cars?

A. Yes, the statement itself says here, Timothy seed, white clover etc.

Q. Well, in going over your records is there anything to indicate it was alfalfa hay?

Mr. Jones: I object to that, because the statement shows upon its face.

The Court: Well, it is smply an explanation of the statement as I understand it. The objection will be overruled.

Mr. Jones: Exception.

A. When this statement was submitted, your honor, by the Agricultural Department of this State we had it checked over in our auditor's office, and all these shipments that consisted of alfalfa hay, I think the statement is rather incomplete because it shows number of bales, but does not show hay, but they all consisted of alfalfa hay with the exceptions noted, such as timothy seed, and white clover seed, etc.

The Court: Would that show for itself?

Mr. Sharp: It does not show it is alfalfa hay. It refers to bales. I just wanted that explanation. The court will take judicial notice of the location of these points of consignment, points of shipment and points of origin.

Mr. French: May I explain one or two items on this statement?

Mr. Sharp: Well, another question, first.

Q. Whenever under the head of "route" "remarks" the statement indicates that there is a certificate attached, that means a certificate of some inspector, some Idaho inspector, does it not?

[fol. 46] A. Yes.

Q. It never refers to a Washington inspector?

A. Well, I think the Idaho inspector would be more competent to explain just what that certificate is. I was not present.

Q. Was it a certificate made by the Idaho authorities?

A. I should say it was a certificate furnished by the inspector of the department of Agriculture, State of Idaho, at the point of origin.

Q. That is what is meant by a certificate of test?

A. Yes sir. There are two or three shipments here; for instance, timothy seed, that second shipment there and a third shipment, timothy seed, and the eight boxes of white clover seed, which are not included in the quarantine order.

Mr. Jones: Well, there is no contention about that, is there?

Mr. Sharp: No, we are not quarrelling about that seed. All our case is based upon the alfalfa hay itself.

Q. Now, all of these shipments here as indicated by plaintiff's Exhibit E would pass through the State of Washington, would they in order to reach their point of destination?

A. It would depend upon the destination. Some portion of Washington. The shipments originated on the Oregon Short Line in Idaho, south of Idaho county, travelling over the Oregon Short Line to Huntington, Oregon; thence Oregon Washington Railroad and Navigation Company to junction point, or point most convenient to reach its destination. It might be that some of these shipments will travel by Pendleton through some portions of Washington, to arrive at an Idaho destination; they might travel by Umatilla to arrive at destination or they might travel by Portland Oregon and thence North, according to their destination.

[fol. 47] The Court: The point is, will they all, in some part of the transportation, pass through the State of Washington?

A. Yes, through some portion of the State, your honor.

Mr. Sharp: So far as you know, in examining those freight bills was any certificate attached, any certificate of the authorities of the State of Washington, showing that the car in load was inspected?

Mr. Jones: Objected to as immaterial and incompetent.

The Court: It may be admitted over your objection. The policy of this court is to permit everything to go in when it is a hearing

before the court itself, so it may all be in the record. The objection will be overruled.

Mr. Jones: Exception.

A. No. There were no certificates issued by Washington State authorities except attached to the way-bill. They were all issued by the Idaho State authorities.

Mr. Sharp: You can go ahead and make your explanation now, Mr. French, if you want to.

A. Well, I think I said all that was necessary. The statement was submitted to us and we checked it over. You have shown in one or two instances incorrect destinations, for instance, you have shown Spokane here, on one or two shipments when they actually went to and were consigned to Idaho points.

Mr. Jones:

Q. And in other words, every one of those shipments were through the State of Washington and not in the State of Washington?

A. They went through parts of Idaho and parts of Oregon and parts of Washington, to get to destinations in Idaho.

Mr. Sharp:

Q. Those shipments marked Spokane there, were they not originally billed to Spokane?

[fol. 48] A. They were billed to Coeur d'Alene," Idaho. Here is a corrected statement, bill of lading, Coeur d'Alene.

Q. Plummer is in the State of Washington, is it not?

A. No, Idaho. Coeur d'Alene is in the State of Idaho. I think the error occurred Chicago, Milwaukee & St. Paul.

Q. It is possible to divert any of these shipments before they reach destination, is it not?

Mr. Jones, I object to that.

The Court: The objection will be sustained.

Cross-examination by Mr. Jones:

Q. Mr. French, do you know of your own personal knowledge whether or not there is any way of communication between the Northern part of Idaho and the southern part of Idaho where these shipments originated otherwise than through the State of Washington or Oregon.

A. I know there is no other means of communication by rail route, other than through those States, th-ough as I said, the southern portion of Idaho, up to Huntington, where the Oregon Short Line——

Q. Huntington, in what State?

A. Huntington, Oregon, where the Oregon Short line delivers the traffic to the O. W. R. R. & N. Co., thence hauled westward to Pendle-

ton, to the junction most convenient to the destination, thence on or through a portion of Washington again into Idaho for delivery.

Redirect examination by Mr. Sharp:

Q. But all those shipments are inspected by the State of Idaho?
A. Only where the notation is made.
Q. Well, the State of Idaho has an inspection law similar to ours, has it not.

Mr. Jones: I object to that as immaterial. That is not an issue in this case.
[fol. 49] The Court: The objection will be sustained.

F. H. Gloyd, being called as a witness on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct examination by Mr. Sharp:

Q. State your name?
A. F. H. Gloyd.
Q. What is your position?
A. I am supervisor of the division of the Department of Agriculture of this State, also Chief Assistant Director.
Q. Are you familiar, with the locations, districts and areas where alfalfa is raised in the State of Washington?
A. Yes, reasonably so.
Q. Do you know the approximate value of the alfalfa crop in the State of Washington, annual alfalfa crop?
A. It would be something like one million dollars, I think.
Q. Where is alfalfa raised principally?
A. Yakima valley and irrigated portions of the Walla Walla district.
Q. Do the principal railroads of the State run through the alfalfa districts or not?
A. The Oregon-Washington and the Northern Pacific, yes.
Q. Does the Oregon-Washington run through the alfalfa district in this state?
A. Yes, the Walla Walla district.
Q. Do the railroad lines of the Oregon Washington coming from Oregon pass through the alfalfa district of the State?
A. Yes.
Q. Any considerable part of them, that is any considerable area of alfalfa?
[fol. 50] A. Yes, there is a considerable area there at Walla Walla, there in that district.
Q. Do you mean a million dollars' worth of alfalfa is raised, or a million tons of alfalfa?
A. Tons. About three hundred thousand acres, something like that.

Q. About one million tons of alfalfa raised in the State?
A. Yes.
Q. And the tonnage, a ton of alfalfa at the present time is worth approximately how much?
A. At this time?
Q. Yes.
A. Well, where would you mean, in the district where it is raised, on the ground?
Q. Yes.
A. Well, about twelve dollars, I should suppose, at this time.
Q. Then what would be the approximate value of the annual crop of alfalfa raised in the State?
A. A million tons would be twelve million dollars.
Q. You are familiar with the pest known as the alfalfa weevil?
A. As I have read of it in the bulletins.
Q. Have you investigated to determine whether or not that pest exists in any of the alfalfa districts of the State at the present time?
A. We have been careful to get reports. We have never found any reports of its being in the State excepting once, and that was not the alfalfa weevil.
Q. Have you ever made an investigation, you or your department, to determine what districts the other states were infested with the pests known as the alfalfa weevil?
A. Yes, there was an investigation made in 1919 with reference to [fol. 51] Idaho, some parts of Oregon and the other localities that are mentioned in quarantine order No. 4.
Q. And that investigation *made* made by what department?
A. M. L. Dean, who was then the chief of the Horticultural Division.
Q. Where is he now?
A. He is in Idaho.
Q. Is he an official in Idaho?
A. Yes, he is the head. He is the chief of bureau of plant industry, that is the title over there.
Q. What was the result of the investigation of the Department as to the localities infested with this weevil?

Mr. Jones: Objected to as not the best evidence.
The Court: I presume some report was made on it, was there not, some report of that investigation?
Mr. Sharp: Was there any report make following that investigation?
The Court: The objection will be sustained.

Mr. Sharp:

Q. Have you a copy of that?
A. I have no copy of that report. I know Mr. Dean made a report.
Q. Was it a written report.
A. I do not know what it was. Mr. Benson was Commissioner of Agriculture at that time and the report was made to Mr. Benson.

Q. Following the report to Benson what steps were taken by the Director of Agriculture in regard to the pest known as the alfalfa weevil?

A. He promulgated an order of quarantine the latter part of 1919.

Q. Have you a copy of that quarantine order?

Mr. Jones: I object to that as immaterial; any order of 1919.

Mr. Sharp: I want to show that it is the identical quarantine order [fol. 52] promulgated in this case. The purpose is to show that after an investigation was made as to the areas affected by this pest the Department of Agriculture promoted a certain quarantine order which of course it would be presumed that the quarantine order was based upon an investigation.

Mr. Jones: There is no allegation to that effect.

(Argument.)

The Court: You are asking now as to a report of an order made in 1919?

Mr. Sharp: In 1919.

The Court: You are not charging that this was a violation of that order.

Mr. Sharp: No, but I charge it as the identical same quarantine order, and this is merely a continuation of the old quarantine order.

The Court: I fail to see the materiality of that. The objection will be sustained.

Mr. Sharp: Exception.

Q. Have you made a study of the habits of the alfalfa weevil, Mr. Gloyd?

A. Well, I have read the Federal bulletins that we get.

Q. And what else?

A. And have made such inquiries as I could from the scientists who have had or have made investigations of that kind?

Q. You have studied textbooks on that subject?

A. Yes.

Q. All available textbooks?

A. Well, I do not know about that.

Q. What is the alfalfa weevil, Mr. Gloyd, from your investigation?

[fol. 53] Mr. Jones: I think we can agree on what the alfalfa weevil is. That is admitted.

Mr. Sharp:

Q. To what extent from your investigation and study, to what extent does the alfalfa weevil exist in the United States and where?

A. Well, it started in Salt Lake City or in that locality.

Q. When was it first started?

A. Well, it has been spreading from that center. I think it was first discovered in about 1904, probably a year before that but not known.

Q. Where did it originate? Where did it come from?

A. From Europe, in Russia and Southern Europe.

Q. How long has it been there?
A. Forever and a day, I guess. It has been there for a long time.
Q. And to what points has the pest spread now?
A. You mean here?
Q. No, in other states.
A. Well, you mean from Salt Lake City?
Q. Yes, in the United States?
A. It covers a considerable portion of Utah, some of Wyoming and according to the reports I have been able to get, the bulletins, it spreads at something like a rate of ten or twelve miles a year.
Q. Without any external influence, just naturally spreads that far?
A. Where it has alfalfa to feed on.
Q. That is the natural migration, it spreads about ten miles a year?

Mr. Jones: Of course that is leading.
The Court: It is rather leading. No question about that.

Mr. Sharp:

Q. How does it spread? The ten miles a year.
A. Well, there are two active portions of each year, as I understand, [fol. 54] one about the first of April, and the other about the first of July, when these beetles are flying, or being sown by the wind, and so on, naturally spreading, as I understand it.
Q. I guess I won't ask any more questions about that. That was covered by Dr. Kincaid.

Cross-examination by Mr. Jones:

Q. Mr. Gloyd, how long have you been in the Department of Agriculture?
A. Since June first, nineteen seventeen.
Q. You were a long time before this quarantine order?
A. I was there two years before the first quarantine order was issued, and then I was there when the last order was issued.
Q. What do you mean by the first order, the 1919 order?
A. The 1919 order.
Q. Mr. Gloyd, do you know of your own knowledge whether or not any shipments made in the State of Washington by the defendant herein of any alfalfa that was infected, or infested by this alfalfa weevil?
A. No, I did not see any of the hay that was shipped in.
Q. Mr. Gloyd, do you know and can you state of your own knowledge whether or not the quarantine order No. 4 the quarantine order issued in this suit, was issued upon any investigation of the alfalfa weevil in the section quarantined?
A. You mean by that, sending any of our men into that district?
Q. Yes.
A. I am not sure that Director French did send anybody in there but I know he made an investigation of the circumstances himself.
Q. In what way?

A. I could not tell you that. Mr. Raup could probably tell you that. He is the head of the horticultural division.

[fol. 55] Q. Mr. Gloyd are you quite certain that there were any investigators sent into that territory?

A. I do not know that there were.

Q. Do you know Mr. Gloyd whether or not there is any weevil in Adams county, Idaho.

A. That is in the northern part, is it not?

Q. No, that is south of your quarantine.

A. No, I do not know of my own knowledge, no.

Q. What investigation has your department made to determine whether or not there was any weevil in Adams county?

A. The same investigation that was made with reference to the southern part of Idaho generally.

Q. What investigation?

A. The investigation made by Mr. T. Green that I reported a while ago.

Q. Do you know what investigation he made?

A. No except I know that he has just returned from a meeting of the western plant quarantine board of which the Idaho commission are members as well as our own department.

Q. Then you do not know as to whether or not there was any investigation of Adams county?

A. I only know that Mr. Green reported an investigation he had made.

Q. And you got a copy of that report?

A. No, I said it was a verbal report.

Q. Do you know what that report was?

A. His report was along the lines——

Q. I refer now to Adams county. You said Adams county was in the quarantined area, didn't you? I don't know anything about Adams county except as it is connected up with Idaho, south of Idaho county. Do you know as to whether there was any report made as to Valley county?

[fol. 56] A. Not except as it was connected up with the balance of southern Idaho.

Q. Do you know whether or not there was any weevils, as the result of any investigation, anything that you can gain any knowledge from, as to whether there is any weevil in Valley county?

A. That was all shown in one report. If you want to ask about these five counties left out of the quarantine order, we have not any quarantine order.

Q. Oh, yes, you have.

A. I have copies of them.

Q. Who have?

A. The Idaho authorities.

Q. Well, we are not representing Idaho.

A. Well, I beg your pardon, but Idaho has their own quarantine orders. They cover everything else.

Q. Can you tell us of anybody in your department, can you give us the names of anybody in your department who can inform

this court as to any investigation that was made in the counties of Adams, Valley, Boise, Elmore and Levigh, Idaho?

A. I know that Mr. French satisfied himself, but I do not know just what investigation he made personally, he and Mr. Robinson.

Q. You only know from hearsay, you do not know of your own knowledge?

A. No, it is only hearsay.

Q. And you do not even know from hearsay what the party actually did to determine where this line should be drawn?

A. No, I do not know just what he actually did.

Q. Mr. French in the city?

A. No.

Q. When will he be back?

A. I expect him tonight.

[fol. 57] Redirect examination by Mr. Sharp:

Q. Mr. Gloyd, you know whether any other states have quarantine orders affecting this same district of Idaho?

Mr. Jones: Objected to as immaterial.

The Court: I do not think that is proper. The objection will be sustained.

Mr. Sharp:

Q. Do you know whether or not the Idaho authorities, that is, the Idaho Department of Agriculture, has made an investigation of the weevil situation?

Mr. Jones: That is objected to as incompetent, irrelevant and immaterial.

The Court: The objection may be overruled. He may answer yes or no.

Mr. Jones: Exception.

Mr. Sharp:

Q. Do you know whether they have made an investigation in the past—the Idaho authorities?

A. Well, I cannot tell whether they made an investigation.

Q. You do not know whether they have or not?

A. No, I do not know, but I know they have issued quarantine orders.

Witness excused.

R. R. White, being a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct examination by Mr. Sharp:

Q. What is your name?

A. R. R. White.

Q. What is your position, Mr. White?
A. Assistant supervisor of grain and hay inspection division——
Q. Are you familiar with the method of the inspection of hay?
[fol. 58] A. Yes sir.
Q. What has been your experience along that line?
A. The inspection of hay is one of our most difficult inspections, difficult from the fact you have to——
Q. How—what has been your experience in the inspection of hay—that is, your experience?
A. Personally, in supervising all the hay inspection, chief inspector.
Q. For how long?
A. Something over two years.
Q. And are you familiar with the method of inspection of alfalfa hay?
A. Yes.
Q. And are you familiar with the Alfalfa weevil and the larvæ of the alfalfa weevil on the stalk of the alfalfa plant?
A. No sir, I am not familiar with that only just from reading the bulletins and seeing the weevils.
Q. Assuming the alfalfa weevil is a small beetle about three-sixteenths of an inch in size and assuming that the alfalfa weevil eggs are about one sixty-fourth of an inch in diameter, are laid by the mother beetle upon the stalk and in the stalk of the alfalfa plant, will you explain to the court what the difficulty would be of inspecting a carload of hay to determine whether or not the alfalfa hay—to determine whether or not the carload of alfalfa hay was infected with beetle or the eggs of the alfalfa beetle on the stalks of the Hay?

Mr. Jones: I object to that question on the ground that it is incompetent, irrelevant and immaterial, and it does not tend to prove any issue or disprove any issue in this case.
The Court: I think it goes to the question of the reasonableness of the order. Objection overruled.
Mr. Jones: Exception.

[fol. 59] Mr. Sharp:

Q. Go ahead, Mr. White, and explain.
A. Well, I really do not quite understand your question.
Q. Assuming, I say——

Mr. Jones: I object to the question further on the ground that it is an incorrect assumption and hypothesis.
Mr. Sharp: I have not introduced this deposition yet. Counsel is familiar with the testimony set forth there. I can say now that the question is abundantly supported by the testimony of Dr. Kincaid as to the habits of the alfalfa weevil.
The Court: I think I will permit the witness to answer over the objection.

Mr. Jones: Exception.
Mr. Sharp: Go ahead, Mr. White.

A. It would be a physical impossibility for our inspectors to inspect hay infested with weevil with any degree of certainty that the weevil was not escaping their notice. We are not equipped with a laboratory that would allow of this class of inspection.

Q. What would be the necessity of examining a carload of hay to determine whether or not there were alfalfa weevils in it or any eggs upon the stalks or in the stalks of the alfalfa plant?

Mr. Jones: I object to that on the ground that the witness has shown by the answer to the former question that the witness is not competent to answer in answer to that question. He says they were not equipped with material or with instruments necessary for an inspection.

The Court: Of course that would not be any reason why an inspection should not be made, or could not be made.

Mr. Sharp: I will amend the question by adding to it this statement:

[fol. 60] Q. Assuming that your office is equipped with sufficient instruments to determine whether or not the stalks of the alfalfa are infested with these eggs and the alfalfa hay is actually infested with live alfalfa beetles, how long would it take an inspector to inspect a carload of hay to determine whether or not it was infected with these beetles?

Mr. Jones: That is objected to on the ground that it is irrelevant, incompetent and immaterial.

The Court: The objection will be overruled.

Mr. Jones: Exception.

A. For commercial inspection of hay in the western market to begin with it is a physical impossibility to inspect against alfalfa weevils. If time is taken in a laboratory to make such an inspection, it is a question I cannot take as to the time it would require.

Mr. Jones: I move to strike the answer as not responsive to the question, and also on the further ground that it is incompetent, irrelevant and immaterial.

The Court: The motion will be denied.

Mr. Jones: Exception.

Mr. Sharp: In order to make such an inspection — would be necessary to be done, with the bales of hay?

A. The bale would have to be broken open and very carefully scrutinized straw by straw. In explanation of that, we are required to break many bales of hay open to determine the quantity of foreign material, various kinds of hay and weeds, and we pick that straw by straw and arrive at our percentage, and in doing so we break one or two bales. Sometimes we have broken as high as a dozen or fifteen in a car to get the percentage of foreign material, but to examine each straw or each stalk would entail a great deal

of time, and nothing but expert chemists could handle it—it seems [fol. 61] to me that way. Hay inspection is the most difficult of all.

Q. How many tons of hay are there in a carload, about?

A. It averages between eleven and twelve, take the season thru.

Q. What is an average price per ton of that hay?

A. At the terminal markets it is now around twenty four or five dollars a ton.

Q. So what would a carload of hay be worth, the market value, ordinary extremes, the minimum price and the maximum price?

A. From $175 to $350.

Cross-examination by Mr. Jones:

Q. Mr. White, I did not quite understand what your duties are? You are the assistant superintendent of Agriculture, hay and grain inspector?

A. Yes.

Q. What are your duties?

A. It is the inspection of hay and grain. As to grain as to the Federal standards, and hay as to state standards.

Q. As to standard quality?

A. Yes.

Q. You have nothing to do with the inspection of hay as to any insects that may infest it?

A. If we find insects where it is infected with insects, we refer that to our college laboratory.

Q. Then there is a further duty imposed upon you to look out for any insect?

A. Yes, I am always looking out for fungus growth and other evidences that may be in the hay.

Q. In what manner do you do that?

A. Well, that is purely superficial, judged by judgment and the eye to see if it is affected, from appearance.

[fol. 62] Q. How do you do it?

A. Just a matter of the appearance of the hay. If we find a hay has something that is new to us, apparently diseased, rust or stem rot or any other disease, we take a sample and sent it to the State college.

Q. Do you take any notice of the locality from which the hay is shipped as to whether or not you should inspect it as to insects?

A. No, but if hay comes that shows the effect of disease we do not study the locality so much as the particular hay. To illustrate the point, this year we have been bothered by getting Montana hay that has had a fungus grown of some character destroying the leaf foliage and we have guarded the best we could against the spreading of that fungus in our fields, three or four cars of which we restricted and required it to be fed in a dry stock yard.

Q. What kind of hay was that?

A. A mixture of alfalfa and timothy.

Q. What about hay from southern Idaho?

A. We have not found in our inspection hay that came from southern Idaho only these two cars in question that were at Spokane.

Q. Two cars. I did not know anything about that.

A. There were two cars destroyed at Spokane that did not come under my department. It came under the horticultural department, that is the only car that I know of that was inspected from Idaho.

Q. Did you personally have anything to do with that?

A. No, I did not.

Q. Who did?

A. The Horticultural Department.

Q. Mr. Gloyd?

A. It comes under Mr. Robinson's department, the horticultural department.

[fol. 63] Q. You say that on these cars of alfalfa you break open the bales, do you, on every car?

A. Oh no, not on every car.

Q. How can you determine what cars to go into and break open the bales?

A. The general appearance. As I said before, hay is the most difficult inspection we have. If the bale is too heavy and as to the color and wiring of the bale and uniformity, if that seems regular it is passed. If the surface indiactes for instance a fox tail sticking out of the bale, we restrict foxtail or other weeds on a percentage basis. If there is indication that there may be over percentage we break the bale.

Q. What do you do after you break the bale?

A. Take that bale and segregate the green hay and the weeds in separate piles and make our percentage record.

Q. The only way you can do that is to separate it, stalk by stalk?

A. Not stalk by stalk, but we get as close to it as we can without entailing too much time and expense. We are limited in the amount of expense we can put on a car of hay.

Q. The only way you can determine whether there is any foreign material in there is to examine the stalks of hay in that bale?

A. I am talking of foreign material as it applies, not to the alfalfa, but as to the other weeds and grasses that is in that bale.

Q. The only way you can determine that is to examine the contents of the bale, stalk by stalk, is not that right?

A. Well, not exactly stalk by stalk. There may be, here—alfalfa runs in what we call slugs—a portion of that may be a solid slug of alfalfa. It is matted together and by pulling it a little apart you can see there is nothing inside of it. We do not examine it stalk by stalk. Generally speaking, we get certain percentages of off-grade foreign material.

[fol. 64] Mr. Sharp:

Q. Do you deny that you did not have actual notice of this quarantine order?

Mr. Jones: No. We admit that.

Mr Sharp: You admit you had actual notice of this quarantine order?

Mr. Jones: Of course as far as the answer is concerned, we do not deny it.

Witness excused.

Mr. Sharp: I wish to put in the deposition of Trevor Kincaid. Dr. Kincaid testified as the prior hearing before Judge Wright. His testimony was taken before Judge Wright in form of a deposition, as a part of the trial of the case. This is not certified by Judge Wright in the form of a deposition.

Mr. Jones: There is a great deal of that that is objectionable and if that is to be put into the record we insist on the attorney reading it.

Mr. Sharp: I will read the deposition and you can object. It is agreed then that for the purposes of this trial this written document will be treated as the deposition of Trevor Kincaid.

Mr. Jones: Subject to all objections.

Whereupon the deposition above referred to was read by Mr. Sharp, as follows:

"TREVOR KINCAID, a witness produced on behalf of the State, being first duly sworn testified as follows:

"Direct examination by Mr. Sharp:

Q. What is your profession, or what position do you occupy?

A. Head of the Department of Zoology, University of Washington.

Q. How long have you been there?

A. Twenty-nine years, since 1894.

Q. In the same position?

A. No, I began there as a student.

[fol. 65] Q. How long have you occupied your present position there?

A. It has been a continuous position. It is hard to say when I broke into the game, because I have been there continuously since 1894. My appointment started at that time as laboratory assistant and I have gone up the ladder ever since.

Q. Have you ever had occasion to consider the alfalfa weevil?

A. Yes sir; my contact with them was at another end: it was really the European end. You see the insect came originally from Europe and was introduced into Utah, in 1904, according to the records. In 1909 I was sent to Europe by the Government to make an investigation in the Balkan district and in Russia and while my main object there was not the study of the European habitat of the weevil that was one of the purposes of my visit, so I investigated the alfalfa weevil in its natural habitat.

Q. What part of Europe?

A. South Europe, Russia and Italy.

Q. In your investigation there how long has the alfalfa weevil been investing that particular territory?

A. From time immemorial; it is its natural habitat.

Q. How is it combatted there?

A. In Europe it is really not a serious pest.

Q. For what reason?

A. The reason is that in Europe its natural enemies exist and they keep it down. As soon as it multiplies in any sections its natural enemies get under way and quickly demolish it.

Q. Have they ever been able to import the natural enemies of the alfalfa weevil into this country so as to keep it down?

A. They have attempted to do that, and I believe have been in part successful, but that takes a long time, to get that natural check, [fol. 66] under way, so that, so far as I know, its natural enemies have not multiplied sufficiently to be an offset. That is what we hope for before long.

Q. What is the alfalfa weevil?

A. It is a small beetle about three-sixteenths of an inch long, oval in shape. A little beak projects down in front of the head like a snout; it is called sometimes the "snout beetle". This little beak is injected into the tissue of the plant and the food of the insect is taken in that way. The alfalfa is destroyed through the operation of thousands of these little beetles that eat away the leaves and the stems.

Q. How large an animal is it?

A. About three-sixteenths of an inch long, ranging from that up to a quarter of an inch, brown in color, hairy on the upper surface, brown and black and gray hairs, somewhat mottled in appearance.

Q. I will show you this case containing remains of certain insects and ask you if the adult insects shown there as adult beetles is a fair representation of the animals themselves.

A. This (indicating) is the pupa case, and these (indicating) are the adult beetles. The case referred to admitted in evidence and marked p't'ff's "A".

Q. In showing you plaintiff's exhibit A, I ask you what are the insects shown above the words "adult beetles"?

A. Those are alfalfa weevils.

Q. Fully grown?

A. Yes sir.

Q. Over the heading "Cocoons" what are they?

A. Those are the little cases in which the pupa secretes itself when it changes from larva to pupa.

Q. What is that stalk shown over the words "infected alfalfa"?

A. That is a sprig of alfalfa that shows the work of the beetle. [fol. 67] Q. Is that a fair representation of the ravages of the alfalfa beetle?

A. Yes sir.

Q. What are those things shown above the words "worm or larval stage, green when living?"

A. Those are the larvæ, early stages of the alfalfa weevil.

Q. How is the alfalfa weevil propagated?

A. During the winter time the beetles are the only stage in existence except there are a certain number of eggs that are in the stalks during the winter; this is over winter. The beetles, when the alfalfa is shooting up in the spring, they wake up from a somewhat torpid condition in which they spend the winter and lay eggs on the young stalks of the alfalfa and in doing that they bore little holes into the rising stalks, and in these little cavities they lay eggs, three or four to a dozen litle green eggs, perhaps a 64th of an inch in diameter. They are oval of course in form. These little eggs hatch out into the larvæ or little worm-like animals without any feet in a sense that we generally use that term, but with a sort of little padlike furs that they use for the purpose to cling to the leaves. These little things emerging from the cavities bore from the stem of the plant and get particularly into the opening leave pits and mine out the interior parts of the opening leaf pits and gradually destroy them in that way. Then as more leaves shoot out they seem to get a little larger and the plant shoots out more stalk, and they spread widely over the leaves, and clinging to the leaves they gradually eat them up. Larvæ undergo three successive changes or successive epochs after they hatch out from the egg until they are completely pupated. During this time they increase in size; they are greenish in color with a white band down the center; of course these are lost in preserved specimens in the bottles. Each larva spins a little cocoon made of [fol. 68] little fibres woven together like a little basket and in this the pupa is formed, the second stage in the life of the insect. It is not shown in the specimen. In this they remain several weeks and emerge as a beetle. The beetles then continue the ravages of the larvæ, although most of the damage is done by the larvæ. The beetles emerging into the fields, they scatter widely at certain periods, when they have certain migratory periods and at the cutting of the alfalfa they are present in vast numbers and are present in the hay and other debris of the alfalfa fields and unfortunately get into the hay at the time of cutting. These beetles remain in the fields until Fall, when they become dormant, and they lay eggs in the Fall, which are also more or less dormant.

Q. Where do they lay the eggs?

A. In the stem.

Q. Of the alfalfa stalks?

A. Yes sir. They are in the cutting of the alfalfa hay. Many of these eggs are detached from the stalks, or hidden in the cavities in the stalks.

Q. How long do these eggs stay? How long can they exist in these stalks until they die so that they will not germinate?

A. They are laid in the late summer or fall—early fall, and they will remain until next spring, when the weather becomes sufficiently warm, and at the same time the beetles emerge from their seclusion these eggs hatch out.

Q. What methods of combatting this pest exist?

A. Well, they have tried a great many things without any proven success; they have tried poisoning them, using poison sprays, they

have used the silt method, running water from irrigation ditches over the fields and carrying the sediment on to the surface of the fields, and it so involves the beetles at that season of the year that [fol. 69] they cannot operate and so they are killed in that way. They have tried burning them and running machines over the ground to burn the ground and stubble; a great many attempts have been made to drag brush over the field and stir up the dust to settle down on the beetles and cover them with mulch. Pasturing has also been brought into use, putting cattle on the fields to eat away the alfalfa and make it impossible for them to have anything to feed upon, kill them by starvation as it were.

Q. Have these methods been found to be completely successful?

A. No one of them has been entirely successful.

Q. When a field of alfalfa once becomes infected with the alfalfa weevil how long does it remain infected ordinarily?

A. There is no practical way of eliminating them completely. It is a battle that must be fought out each year to a large extent; they multiply so enormously. We thought at first they laid about 300 eggs, but I believe they have found some laying as high as 600 eggs each season.

Mr. Jones: We move to strike the answer as it is not shown that the witness was competent to answer the question as he has answered it.

The Court: Well, I take it that he has testified as an expert. The motion may be denied.

Mr. Jones: Exception.

Q. If a field once becomes infected in all probability how long will the field remain infected?

Mr. Jones: I object to that on the same ground.

The Court: The objection may be overruled.

Mr. Jones: Exception.

A. As far as our present methods are concerned, it will be indefinite.

Q. How long time in Europe?

[fol. 70] Mr. Jones: Objected to as incompetent, irrelevant and immaterial.

The Court: The objection may be overruled.

Mr. Jones: Exception.

A. As long as they have had any history of cultivation of alfalfa in Europe there has been an enemy of alafalfa.

Q. There, you say, there is a natural enemy of the insect, and it is not so destructive on that account?

A. That is true.

Q. How is this beetle carried from one point to another? How is this infection of the alfalfa weevil carried from one district to another?

A. In many ways, but the greatest danger is through the transfer of hay from one section to another because the hay will contain either

the weevils themselves in more or less dormant condition, or the stalks of the hay may contain the eggs, so that infection may be carried even if no weevils are apparent, infection might be carried in the hay or the eggs.

Q. That is, carrying hay from an infected district to an uninfected district, to or through—what is the effect of carriage through an uninfected district in box cars?

A. There is a possibility of hay containing weevils on the stalks or eggs attached to the stalks. There would be possibility of some of the material from the bundles of hay being spilled out, that is, the weevils themselves, from the bundles of hay, would creep out through some very small crack, being only one-sixteenth of an inch in diameter they could get through a very small space, and could get out through cracks in doors and creep out on the ground, and if there is any alfalfa on the right-of-way they would attack it.

Q. Suppose a box car hauls hay from an infected district to an uninfected district and is unloaded, is there any danger of the car itself being a carrier of disease after the hay is removed?

[fol. 71] Mr. Jones: Objected to for the reason that the witness is not qualified to answer.

The Court: The question will be overruled.

Mr. Jones: Exception.

A. That might be a cause of danger from the hay formerly carried from an infected district, because if there is any hay left in the car by any chance it might very well contain infection if they re-routed it and carry it to some other district. They might very well sweep out a spray of diseased alfalfa.

Q. Have you had occasion to consider a locality where the pest was present, prevalent, in this country?

A. I have followed with a great deal of interest the gradual spread of the insect; although of course the time my work was done in Europe, 1909, was only five years after the insect was known in the United States; probably it was in the country several years before 1904; but our first knowledge of it was 1904. I have followed with a great deal of interest the gradual spread, although I have not studied an infested area except on one occasion very briefly, but from the records of *etymologists* who have studied it, and state reports emanating from the various States, it apparently spreads from the center at the ratio of about ten miles a year.

Mr. Jones: I move to strike that answer as incompetent, irrelevant and immaterial.

The Court: The motion may be denied.

Mr. Jones: Exception.

Q. What are the districts infected?

A. Started at Salt Lake City, and spread northward and southward and eastward and westward in Utah, and spread into Utah and Idaho, that country being contiguous, and from there spread into probably [fol. 72] all adjacent regions. Our own State is not infested but it is approaching it fast enough.

Mr. Jones: I move to strike that answer.

The Court: The latter part of that answer may be stricken, that it is "approaching it fast enough."

Mr. Jones: Exception.

Q. What can you say about the probability of a method of inspecting and protecting itself against hay coming from infected districts, whether or not it is practicable—what difficulties you would have in inspecting hay, carloads or consignments of hay, coming from infected districts, or districts in which the weevil was supposed to exist, in order to prevent the spread of the disease?

Mr. Jones: I object to that as irrelevant and incompetent.

The Court: The objection will be overruled.

Mr. Jones: Exception.

Objected to by counsel for defendant as irrelevant and incompetent.

The Court: I will reserve ruling on that.

—. It would be impossible to inspect a bale of hay and say it was free from the weevil by superficial examination. A bale might contain internally thousands of weevils and possibly hundreds of thousands of eggs without any showing any sign on the outside, and the only way to inspect it to carry out the program would be to unbale the hay and set a man at work with a magnifying glass to examine every bit of stalk to see if there is any fertile eggs.

Q. How long would that take for a carload of hay?

A. It would take a month to examine a single bale.

Q. What would be your opinion as to the only practicable method of quarantine method of keeping hay out of an uninfected district, a district not infected with these weevils?

Mr. Jones: Same objection.

The Court: The objection may be overruled.

Mr. Jones: Exception.

[fol. 73] A. The only practical solution is total exclusion of the hay for such time until some method is designed for disposing of the weevil through natural enemies or the discovery of some other effective way of control.

Q. Would it be possible for the Department of Agriculture in fixing a quarantine district to fix any definite time for the operation of a reasonable quarantine order?

Mr. Jones: I object to that as calling for a conclusion of the witness. The reasonableness referred to is a conclusion of law. I object on the further ground that witness is not competent and is not shown competent to testify in answer to this question.

The Court: The objection will be overruled.

Mr. Jones: Exception.

A. It would be impracticable to set any limit. The only limit that could be set is that which I have suggested, else possibly the weevil

may come into our own territory. When our own territory becomes infested equally with territory elsewhere of course it will not be to our disadvantage to permit hay to come in because it will be as bad in our territory as it is in theirs. That time may come and the quarantine will then be of very little avail to us. On the other hand, to set a limit to the time when we will is not scientifically practicable. To attempt to set the time when it will cease to be a pest would be to require second-sight. I do not know.

Q. If cattle eat the alfalfa weevil or stalks, does it hurt the stock itself, the cattle?

A. It hurts the stock; particularly the dried hay, not only the dried weevils, but also the excrement of the weevils, that is a very serious drawback, to feed it to the stock; they are seriously damaged by the weevils.

[fol. 74] Q. But stock can be driven into the district and fatten on the alfalfa there?

A. Growing alfalfa, yes sir; that is practicable. That is one of the means of control really, to feed alfalfa to cattle on the ground while it is growing hay.

Cross-examination:

Q. I do not understand as to natural enemies.

A. There are a number of natural enemies; perhaps the most important one is in Europe—are enemies, to make it plural, little flies, winged insects flying about in the field where the weevil is breeding; they sting and deposit an egg on the leaf, and the egg develops into a maggot-like fly and destroys it in that way; they have found a number of things in Europe to fight it that way there, and it is the hope of scientists to fight it that way here; it is the attempt of the Department of Agriculture in Washington to establish those parasites in this country.

Q. Has that been done to any extent?

A. They have introduced them, but I have not heard how far they have succeeded. That usually takes a long time, because an insect from a foreign country requires some time to establish itself and become acclimated. The climate usually destroys a large number of them and there is a process of selection and finally a stock of these parasites is evolved that is active and gets things under control. That has been done with many other pests. The introduction of a certain Australian beetle in California to fight the scale was successful and it was attempted to introduce another from Guatemala to fight the boll weevil, so the great hoped for relief is from that direction.

Q. Do I understand you to say that this insect started in this country in Utah?

A. Yes sir. In Salt Lake City.

[fol. 75] Q. Are scientists able to tell where it came from and where—how it came?

A. There is no knowledge as to how it came. It probably came in several years before that, but they have only speculation as to how

it arrived. They know it must have come from Europe, because there are no such insects in this country. There are some latent forms; it is presumed probably the weevil arrived in the packing of some goods, probably immigrants from Europe brought them in the hay with which they packed their household goods, and when they arrived in Utah they escaped.

Q. It is purely speculation? There is nothing but speculation on that?

A. Yes sir; there is no way of proving that.

It is stipulated that paper admitted in evidence and marked "Plaintiff's Exhibit B" is a copy of a statement taken by Mr. F. H. Gloyd and Mr. Ray Dalton from the records of the defendant at Portland, Oregon, showing way-bill Number, car initial and number, date of shipment, from what point to what point, consignor, consignee, number of bales, weight, route or marks shown on original bills of lading on file in the offices of the defendant. Counsel for defendant reserves the right to make objection at the trial and also to verify the data shown on the statement if desired so to do later."

Mr. Sharp: I now desire to introduce the deposition of Miss Bertha Hackman.

Whereupon the deposition of Miss BERTHA HACKMAN was read as follows:

Q. "Where are you employed?

A. At the Department of Agriculture, Olympia, Washington.

Q. In what capacity?

A. Stenographer.

Q. Do you take care of the mailing of letters, notices and things? [fol. 76] A. Yes sir, I do.

Q. This paper is supposed to be a notice mailed?

A. That was to the N. P. and the O. W. February 1, I believe.

Q. And what is this date, December 29, 1922?

A. Nineteen twenty-one, December 29, 1921 that was.

Q. That is an error then?

A. I did not notice that date before.

Paper admitted in Evidence and marked Plaintiff's Exhibit C.

Objected to by counsel for defendant as containing additional instructions, of which no charge is made that the defendant violated them, and subject to further objections the same as the rest of the testimony, and further subject to the possibility of not being willing to admit that the defendant had notice, counsel not being prepared at this time to admit or deny receiving such notice.

Mr. Jones: I object on the ground that it does not show that we even received Number Four, this reference to Number Four, it does not show that we received any copy of Number Four.

The Court: The objection will be overruled.

Mr. Jones: Exception.

By Mr. Sharp, continuing:

Q. Will you look at this paper which I hand you and state what that is?

A. That is a duplicate of a letter written.

Q. You mean that is a copy of a letter of what?

A. A letter written to the Oregon Washington Railway Company.

Q. At what time?

A. February 1, 1922.

Admitted in evidence and marked Plaintiff's Exhibit D.

[fol. 77] Mr. Jones: I object to Exhibit D as incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Jones: Exception. I do not know that I have made exceptions to all of plaintiff's exhibit C as specifically as I should. We object to it because it does not show any copy of this quarantine order given or sent the railroad company. This letter is simply a resume of the orders issued by the Department and does not state in this that any copy was ever sent to the railroad company.

The Court: Well, it may not have bearing on the subject but I will admit it, and only such parts of it will be considered as the court thinks to be material.

Mr. Jones: Exception.

Q. I hand you Plaintiff's Exhibit C and ask you what that is?

A. That is a summary of the horticultural laws and quarantine orders written to the different railroad companies. It was at the request of the Great Northern.

Q. Was that enclosed in this letter of which this Plaintiff's Exhibit D is a copy?

A. Yes sir.

Q. Do you know they were mailed?

A. Yes sir.

Q. How about the date on Plaintiff's Exhibit C. Is there any error in that date or not?

A. There is.

Q. What date is it?

A. It should be December 29, 1921.

By the Court: It may be understood that these are subject to the same objection by counsel for defendant later.

[fol. 78] Q. When were these mailed?

A. The copy of the summary?

Q. Yes and the letter?

A. The date it was written.
Q. What was that?
A. February first, 1922.

Cross-examination:

Q. You were supposed to send a copy of this to all railroad companies doing business in this state?
A. No, not all. The Great Northern, the O. W. and the Chicago-Milwaukee.
Q. Have you personal recollection of mailing that out to the O. W.?
A. I am sure I have.
Q. Is it just that you were supposed to mail them or have you some particular reason for recalling it, to the O. W.
A. I have no particular reason except I was requested to mail it according to request and according to instructions.

Witness excused.
Adjournment taken until 3.30 p. m.

Upon reconvening the following proceedings were had:

PETER J. O'GARA, being a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Sharp:

Q. State your full name.
A. P. J. O'Gara.
Q. Where do you reside?
A. Salt Lake City.
Q. What is your business?
A. I am in charge of research work for the American Smelting and Refining Company.
[fol. 79] Q. Where, if ever, have you received a degree from a university?
A. I received my Bachelor of Science from the University of Nebraska. Doctor of Science later on, same institution.
Q. Where were you employed after you secured your degrees?
A. I was first employed in the United States Department of Agriculture as Pathologist, at Washington, D. C.
Q. How long were you there?
A. From 1902 to 1910. I then took charge of work in Rogue River, Oregon, pathological work. In 1914 I went to Salt Lake Valley.
Q. When did you take up your work with this company?
A. 1914.
Q. In connection with that work what investigation if any have you made of the alfalfa weevil?

A. The investigations that we have made have been directly in connection with our own farms. We are operating farms at both of our smelting plants there.

Q. How large are the farms?

A. One farm is in the neighborhood of about fifty acres and the other in the neighborhood of about sixty acres.

Q. Do you ever raise any alfalfa?

A. Yes, that is our principal crop.

Q. Are you in the district infected by the alfalfa weevil?

A. Yes, approximately in the center of it.

Q. Have you made an investigation of various works on the subject, and bulletins etc.?

A. Not being an entomologist, I have not made a particular study of the alfalfa weevil except as at work in the field.

Q. You have observed it personally?

A. Yes.

[fol. 80] Q. What would you say with regard to the possibility of eradicating the weevil, as a pest in the territory? In a district that has been infested?

A. I do not think it is possible.

Q. What has been the experience of the district in which your farms are located?

A. The experience is that all efforts at eradication have failed and sometimes are difficult to control.

Q. Do you know when the alfalfa weevil was first found in that district?

A. I think in the year 1904. The exact location being pointed out to me as being very near the State penitentiary, which is only about six miles from one of the farms I have mentioned.

Q. How long have you been down there?

A. In the Salt Lake Valley?

Q. Yes.

A. Since March 1914.

Q. Have the farmers attempted to control the weevil or eradicate it?

A. Yes.

Q. By what method?

A. Largely by brush-dragging, and sometimes by irrigation.

Q. Poison.

A. Poison has been used through the United States Bureau of Entomology, the use of lead arsenic and now calcium arsenic.

Q. How long have you been there?

A. Since 1914.

Q. What has been the result in the attempt to eradicate and control the weevil in that district?

A. Some control has been effected but I do not think any headway has been made in the way of eradication. I do not think it is attempted.

[fol. 81] Q. What can you say with regard to the tendency of carrying the infection from one district to another as a result of

baling alfalfa hay from fields that are infected with the alfalfa weevil?

A. I do think it is possible.

Mr. Jones: I object to that on the ground that it is incompetent and immaterial in this case. The only inquiry that the court could go into in this case would be the carrying of this weevil or the spreading of it by shipping the hay. Counsel's question, in other words, is too broad. He does not confine it——

The Court: I rather think that is correct, Mr. Sharp.

Mr. Sharp:

Q. Then what would you consider the possibility or probability of carrying this pest from an infected to an uninfected district as a result of baling hay from fields, harvested from fields that were infested with disease, and shipping it in open box cars to and through districts in which the alfalfa was used and which was uninfected by the pest?

Mr. Jones: I object to that. There is not any allegation in this case, in the complaint, that would say alfalfa was shipped in open box cars.

Mr. Sharp:

Q. Well, I will say in Box cars.

A. Was it a matter of just carrying the weevil?

Q. Yes, carrying the weevil from infested fields.

A. I think there would always be a possibility, particularly in the shipment of the first crop.

Q. From your experience on the farms there do you bale your hay?

A. We feed our hay direct. We do not bale.

Q. You are familiar with the baling process?

A. Yes, baling is carried out in a great many parts of the valley.

[fol. 82] Q. From your experience with the alfalfa weevil what would you say as to the practicability of inspecting a carload of hay, of baled hay, originating in an infected district, for the purpose of determining whether or not the hay was infected with live weevils or the eggs of the weevil?

A. I think it would be impossible; to attempt to do it would be like finding a needle in a haystack. It would be very difficult.

Cross-examination by Mr. Jones:

Q. Mr. O'Gara, if hay was inspected from an infected district by inspection it would not be difficult to find the weevil, would it?

A. I beg pardon.

Q. By an inspection of hay that is baled from an infested district, it would not be difficult to find, would it?

A. It would, unless the bales were broken. Every bale opened up and you would have a tremendous time to be taken to do it. It would be very difficult to do it, I think. I think I can give you an instance. In 1914 I made a drive to California to attend a certain

meeting at Davis, at the Agricultural station. I selected some specimens of alfalfa because I wanted to demonstrate a certain other trouble which was a bacterial blight; I thought I had eliminated the specimens from the weevil, but I found when I reached California some very pretty little cocoons so if the hay were baled and sent to California they might be shipped through.

Q. Did you ever hear of colonies being started from the infested districts, otherwise than the natural spread and crawling or flying of the weevil?

A. I could not name any at this time. No, I have not followed that part of it.

Q. Did you ever hear of a colony being started by the shipment of hay in a box car or on a railroad?

A. I do not know as to that.

[fol. 83] Q. Have you read the farmers' bulletins issued by the United States Department of Agriculture, No. 741?

A. I have a copy of it in my office, and I know Mr. Reaves personally who wrote it. Mr. Reaves and laboratory, the facts are very near our own. I cannot say that I recall everything that is in it, but I have read it over.

Q. Do you agree with the propositions set forth in that bulletin?

Mr. Sharp: I object to that unless it is read to the witness.

Mr. Jones: Do you agree with this, "No connection can be traced between the railroads and the actual spread of the alfalfa weevil"?

A. I do not know anything about that.

Q. Did you agree with that; you are an expert?

A. No, I do not say that I am an entomologist; I am stating just what I have seen.

Q. Where do you live?

A. In the Salt Lake Valley.

Q. You were brought here by the State as a witness?

A. I simply came into the city and knowing Mr. Gloyd I called on him and he asked me to come over. I am not an expert on this in any sense of the word. I am not qualified as an entomologist.

Q. What is your work now?

A. I am in charge of certain research work, agriculturist for the American and Refining Company.

Q. Have anything to do with the weevil?

A. Yes sir. We are supposed to make observations of the destruction done by that insect throughout the valley in relation to our smelter. We are often charged with certain injuries which we know are not caused by us as agent and the alfalfa weevil is one of the injuries that we have got to observe.

[fol. 84] Q. I do not know what your answer was to this, whether or not you agreed with the proposition as set forth herein, as I read it, "No connection can be traced between the railroads and the actual spread of the alfalfa weevil, in fact the advance of the weevil has been rather slower along certain railroads than in some regions remote from them." Do you agree with that?

A. I presume if Mr. Reaves wrote it he wrote it according to his

observation. I have no observation myself, therefore I cannot answer that question.

Q. Do you know anything about the spread?

A. No, not about the spread. So far as the railroads are concerned, no, I do not know.

Q. Then all you want the court to understand here is that there is a possibility, or there might be a possibility of its being carried by the railroad companies, but you do not know of any instance of its having been carried?

A. I do not know of any, no.

Q. And you do not pretend to be an expert on that question?

A. On the matter of the migration of the weevil, I do not.

Q. You can not name one instance?

A. No.

Q. In which this has been spread by the railroad company?

A. No.

Redirect examination by Mr. Sharp:

Q. Who is Mr. George R. Reaves that wrote this Farmers Bulletin No. 741?

A. He is connected with the United States Bureau of Etymology and has been detailed to Utah and the entire mountain country to study the weevil.

Q. Do you know Mr. Philip B. Miles?

A. No, I do not.

[fol. 85] Witness excused.

Wyatt W. Jones, being a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct examination by Mr. Sharp:

Q. Give your full name?

A. Wyatt W. Jones.

Q. Where do you live?

A. Salt Lake Valley.

Q. What is your business?

A. I am employed by the American Smelting and Refining Company.

Q. The same company as the previous witness?

A. Yes. To inspect property adjacent to theirs in that valley and I am in charge of the two farms that they operate there under the witness that preceded me.

Q. Have you a degree from some school?

A. Yes. I have a Bachelor and Master degree from Montana Agricultural College and a Bachelor degree from Harvard University and Master's degree from University of California.

Q. In what line?

A. Biology, includes biology, zoology and——

Q. You raise alfa'fa hay on those farms?
A. Yes, we do.
Q. That is near Salt Lake City?
A. Yes.
Q. What has been your experience on those farms with the alfalfa weevil?

Mr. Jones: I object to that; he has not shown his qualifications. You should ask him what he knows about the alfalfa weevil.
Mr. Sharp: Well, what do you know about the alfalfa weevil, then?

[fol. 86] A. Well, it is a small beetle which attacks the alfalfa——

Mr. Jones: I object to that as not responsive to the question.
The Court: What was your answer as to your position there, Mr. Jones?

A. I am in charge of the two farms owned by the company and am also employed to inspect the premises of farms adjacent to the smelter owned by our company for the purpose of determining the diseases met and conditions and diseases probable or unprobable to crops.

The Court: The objection will be overruled.
Mr. Jones: Exception.

A. It is a small beetle which attacks the alfalfa particularly in the immature stage and eats up particularly the younger leaves and the bodies and in severe cases leaves nothing but the stem.
Q. How is it propagated?
A. By eggs which are laid in the stems of the plant by small punctures made by the snout-like mouth part of the insect and they hatch after a certain period and these little green worms appear and attack the more tender parts of the plant. Just an annual repetition of that process.
Q. Are your farms there infested with this alfalfa weevil?
A. They are.
Q. How long have they been there?
A. Since 1914. Well, I have been living on one of the farms since 1918, the fall of 1918, but working on them since 1914.
Q. Have you been familiar with the ravages of the beetle there since 1914?
A. Yes.
Q. What efforts have been made to control or eradicate the pests during that time?
A. The first crop of alfalfa is cut when——
Q. I mean have efforts been made in various ways?
A. Oh, yes they have. I was just going to tell you what efforts [fol. 87] have been made.
Q. Well, briefly, state the headings of what kind of efforts have been made, without going into detail.
A. Well, dragging the fields to produce a dust conditions, with-

holding the irrigation water a few days and repeating that process each year.

Q. That is followed by the farmers around there in that district, is it, more or less?

A. Yes, more or less.

Q. What has been the result, so far as the extent of the spread is concerned in that district? Does it prevent——

A. It does not prevent the spread of it at all. It holds it down somewhat and enables the farmer to harvest more hay than he would otherwise.

Q. Does it eradicate the pest?

A. Oh no, in no wise.

Q. Have you made a study of the weevil from text books and bulletins?

A. Yes, to a certain extent.

Q. What is the possibility of eliminating the weevil from any district that has become infested with it?

A. I should just have to give my judgment in that.

Q. Give your judgment.

A. That there is no possibility of eradicating it, once the weevil——

Q. Once the weevil always the weevil, is that it?

A. Yes.

Q. What is your opinion with respect—do you bale hay in that district?

A. Yes.

Q. Ever had any experience in having hay baled?

A. Yes, not on our farm however.

Q. You know how it is baled?

[fol. 88] A. Yes.

Q. What is your opinion with regard to the practicability of inspecting a carload of baled hay that has been harvested in an infected district, for the purpose of determining whether or not live weevils or larvæ or eggs are present in the baled hay?

A. Well, since the insects are a little over an inch long it is absolutely out of the question to determine how many in a bale of hay.

Q. Without what?

A. Separating the bale out and examining every little handful of hay, raking it over.

Q. You consider that practical or not?

A. It is out of the range of practicability entirely.

Cross-examination by Mr Jones:

Q. Mr. Jones, I did not understand what your evidence was, what your business was?

A. Well, I am in charge of the farms owned by the American Smelting and Refining Company in Salt Lake City. I inspect all the farms and the agricultural region around the two plants owned by that company in the valley with reference to diseases and all agencies that affect the health of crops; that is, I look to see what conditions prevail.

Q. What is the size of those farms?
A. Our farm?
Q. Yes.
A. One of them is forty seven acres and the other is sixty three. The mines and the railroad right of way that are put through recently would make it about sixty, I should judge.
Q. The only experience you have gotten with this weevil has been with these farms, is it?
A. I do not quite get that question.
[fol. 89] Q. Well, how long have you been working for these people?
A. Since 1914.
Q. And you have just had a couple of farms there, one of 47 acres and one of 63?
A. I inspect the entire region around those two smelters where the alfalfa weevil is there, where millions of them are all through the spring months, the first crop. I do not know that I understand your question.
Q. Well, you spoke about their laying eggs. When do they lay eggs?
A. Oh, the exact time I could not tell you. They are emitting at the time the alfalfa is about six inches high. I have seen them emitting at that time.
Q. Is that egg laying?
A. That is what immediately precedes the egg laying. I do not know just how many days; I do not know the number of days between the emitting and the egg-laying.
Q. What time of year is that?
A. Well, it is in the spring of the year, I should say April.
Q. Do you know how long these eggs deposited in the stalk remain fertile?
A. No, I do not.
Q. Don't you know, as a matter of fact, within fourteen days the eggs are not fertile, they are either hatched or else they are no good?
A. That is probably the rule, but not what we would expect.
Q. That has been your experience?
A. Well, I say, I——
Q. So far as you know that is true, is it not?
A. Well, so far as I know, that is true, yes.
Q. Do you know anything about the spread of the weevil, the causes of it?
A. No, only through reading of it, on the subject.
[fol. 90] Q. Ever read or ever hear of a railroad company spreading weevils by the shipping of hay?
A. I know of no details along that line.
Q. Never heard of it, did you?
A. Oh, I have heard of the spread of it but as to how, I don't know.
Q. Never heard of it in a railroad shipping hay?
A. No, I do not know that.

Q. You have been there and you have made a study of this insect and of its ravages and so on since 1914?

A. Yes.

Q. And you have never heard of a railroad company shipping hay in box cars or upon cars, of a railroad company spreading the weevils?

A. Well, I do not know that such is the case.

Q. How long did you say that this adult weevil is?

A. Somewhere near an eighth to a quarter of an inch. It is a small insect.

Q. You are employed by a smelter company, is that right? And is it not primarily your duty that is, the duty that is required of you by your employer to inspect this life in the vicinity of the smelter to determine what damage the smelter does?

A. Primarily, I do not know that it is. It is our duty——

Q. Well, primarily your duty is not to inspect this little farm of forty acres and of sixty three acres, is it?

A. Primarily, I think it is our duty to know what conditions are on the farm in the various crops?

Q. Is it not a fact that the farmers were objecting to the smelter in the vicinity there?

A. Yes.

Q. And that was your duty there, to determine what damage your smelter did to the farmer?

A. Yes, that was included in my duty.

[fol. 91] Q. Had nothing to do with the alfalfa weevil did it?

A. Had to do with everything in the valley that effected the crops.

Q. Well, you did not bring alfalfa weevils there, did you, your smelter?

A. We hope not.

Q. You had nothing to do with the propagation of it?

A. I do not know of any way that we are connected with it.

Redirect examination by Mr. Sharp:

Q. Mr. Jones, what is the effect upon the crop infected with this alfalfa weevil, what is the effect on the alfalfa hay crop over the area affected by the weevil?

A. Will you please re-frame that question.

Q. What is the effect of the infection with the alfalfa weevil on the area from which the crop of alfalfa is grown?

A. You want to know with reference to the yield?

Q. Yes.

A. Well, it reduces the yield.

Mr. Jones: I think that is immaterial, and incompetent and irrelevant.

The Court: Oh, it shows the result of the infection. I think it is one thing he is getting at. The objection will be overruled.

Mr. Jones: Exception.

A. It reduces the crop materially and—and it also necessitates

early cutting and less yield on that account, and immature hay which is not as valuable as matured hay.

Mr. Sharp: In an area upon which alfalfa is grown and which is badly infected by the insect, to what extent is a crop damaged in the total yield?

A. Well, the first crop is of very little value if means are not taken to control the weevil and the value would then depend upon the care——

Q. Well, what expense is attached to the various methods for the control and possible elimination of the weevil?

[fol. 92] A. Well, it is expensive to have to brush or drag a field, and by delaying irr-gation a few days or a week it retards the growth of the second crop and delays that so that the second is later, and the third must be later, and the winter season—the frost—may damage the third crop.

Witness excused.

Mr. Sharp: At this time I wish to offer in evidence a certified copy of quarantine orders No. Four and Eight of the Department of Agriculture.

The Court: Those are the orders set out in the pleadings?

Mr. Sharp: Yes. It is proof of the order and the proclamation too. This is a certified copy of quarantine order No. Four which contains an instrument at the bottom signed by the Governor, dated November 17, 1921, at Olympia, Washington, and I ask that it be admitted.

Mr. Jones: Is that what you furnished? Did you furnish us with a copy of that?

Mr. Sharp: It is attached to the complaint.

Mr. Jones: I mean was the Governor's proclamation?

Mr. Sharp: This contains the endorsement referred to in the bill of particulars.

Mr. Jones: We have no objection.

The Court: It may be admitted.

(Marked Plaintiff's Exhibit F.)

Charles L. Robinson, being a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct examination by Mr. Sharp:

Q. Your full name?

A. Charles L. Robinson.

[fol. 93] Q. Your business?

A. Supervisor of the division of Horticulture in the Washington State Department of Agriculture.

Q. Have you ever received a degree in any school?

A. Yes, Bachelor of Science in Horticulture from the Oregon Agricultural College.

Q. What are your duties in connection with your position in the State Department, and what were your duties in the month of January and February of 1922?

A. I was in the same position as now, supervisor of horticulture. We have in the State some ten district horticultural inspectors and under them a number of deputy horticultural inspectors who have charge of the enforcement of our State quarantine laws, the inspection of orchards and other agricultural crops for the control of diseases and the inspection of the fruit and vegetables under our State drainage laws as well as voluntary certification service.

Q. What do you know, or are you familiar with quarantine order No. Four of your Department?

A. Yes.

Q. When was that promulgated, do you know?

A. It was promulgated in September, 1921.

Q. What if anything do you know as to notice of this quarantine order being given to the railroads and particularly to the defendant in this case?

A. At the request and suggestion of one of the larger railroad firms in this state, or companies, I drew up a summary of the various State quarantine orders and the State horticultural law as it might affect the railway agents.

Q. Does that include the summary Order No. Four?

A. Yes, this was put out by one of the railroad companies later [fol. 94] on. I sent a copy of this summary to the other large firms in the state, including the O. W. R. R. & N. Co. and with that a mimeographed copy of all the quarantine orders in effect at that time.

Q. What time was that sent out?

A. About February first, 1922.

Q. Showing you plaintiff's Exhibit C I ask you if that is a copy of the summary that you sent out at that time?

A. Yes.

Q. How were these sent out, in what way?

A. Mailed.

Q. Were these—state whether or not these quarantine orders were mimeographed.

A. Yes, they were mimeographed.

Q. I show you this copy and ask you if the copy that was sent to the defendant in this case was in that form?

A. Yes.

Mr. Sharp: This is just the same thing as attached to the complaint, and I ask that this be admitted in evidence.

Q. Is this an exact copy of the order mailed to the defendant?

A. So far as I know. I think we only made the one stencil for it.

Mr. Sharp: I ask that it be admitted in evidence.

Mr. Jones: No objection.
The Court: It may be admitted.

(Plaintiff's Exhibit G.)

Mr. Sharp:

Q. Mr. Robinson, what do you know about the western plant quarantine board and what is it?

A. The western plant quarantine board is a voluntary association of the plant quarantine officials of the eleven far western states and British Columbia, who meet once each year to discuss plant quaran- [fol. 95] tine problems, the effect of the ravages of various pests and diseases, and the possibilities for controlling them, especially with the possibility of their being kept from spreading from one State to another.

Q. Who are members of this organization?

Mr. Jones: That is objected to as incompetent and having nothing to do with the issue in this case.
Mr. Sharp: This is preliminary.
The Court: The objection will be overruled.
Mr. Jones: Exception.

Mr. Sharp:

Q. Who are the members who regularly attend these meetings—how often are the meetings held?

A. Once a year.

Q. Who are the members and who attend these meetings?

A. The quarantine officials of the various states, sometimes going under one name and sometimes under another. They are ex-officio members.

Mr. Jones: I want it understood that we object to all of this testimony with reference to this board.

Q. How about any inspectors, members of the Federal Horticultural Board?

A. There are members of the Federal Horticultural Board that attend.

Q. How about the Experimental Stations?

A. Yes, frequently members of the experimental stations of the various states and quarantine inspectors, and entomologists and pathologists are invited to come and speak on these pests and the control thereof.

Q. When was the first meeting held?

A. In my recollection it was in 1919 at Riverside, California.

Q. Has some representative of the Department of Agriculture, of this state, always attended those meetings?

[fol. 96] A. That is my understanding.

Mr. Jones: I object to that.
The Court: I rather think you had better get down to what you

are driving at Mr. Sharp. We want to be sufficiently liberal with this examination, but I would like to know your point before you go further.

Mr. Sharp: Well, part of the purpose of this examination is preliminary to offering in evidence the proceedings of these various meetings of the western branch of the quarantine board for the purpose of showing the various essays and so on, covering this particular pest.

Mr. Sharp:

Q. I hand you this bulletin and ask you what that is?

A. This is a monthly bulletin of the California State Department of Agriculture, in which are printed proceedings of the first interstate plant quarantine conference.

Mr. Jones: I object to this as incompetent, irrelevant and immaterial and having no connection with the case.

Mr. Sharp: I offer this in evidence with the preliminary statement made by the witness.

Mr. Jones: We object to it on the same grounds.

The Court: The objection will be sustained. I do not think that is proper evidence.

Mr. Sharp: Exception. We particularly offer in evidence that portion of the proceedings set forth in this bulletin which relates to the alfalfa weevil.

The Court: The objection will be sustained.

Mr. Sharp: Exception. I ask that the record show that this bulletin was offered in evidence and excluded by the Court.

The Court: It may be offered for identification if you desire.

Mr. Sharp: I will ask you what that bulletin is.

A. This is also a monthly bulletin of the California State Department of Agriculture, giving the proceedings of the Second convention of the plant quarantine board held in Salt Lake City, Utah, in 1920.

[fol. 97] Mr. Sharp: I ask that this be admitted in evidence and particularly that portion of the proceedings of the second convention of the western plant quarantine board which relate to the alfalfa weevil.

Mr. Jones: That is objected to as incompetent and immaterial and not material to the issues in issue in this case.

The Court: The objection will be sustained.

Mr. Sharp: Exception. I will ask that this be marked for identification.

(Marked Plaintiff's Identification I.)

Mr. Sharp:

Q. What is that (indicating)?

A. That is another monthly bulletin of the California State De-

partment of Agriculture, giving the proceedings of the convention of the Western Agricultural Representatives, Central Horticultural board and western plant and quarantine board.

Q. For what year?

A. 1922.

Mr. Sharp: I ask that this be admitted in evidence, particularly that portion relating to the alfalfa weevil.

Mr. Jones: That is objected to as incompetent, irrelevant and immaterial to the issues in this case.

The Court: The objection will be sustained.

Mr. Sharp: Exception. I will ask that this be marked for identification.

(Marked plaintiff's identification J.)

Mr. Sharp:

Q. Have you ever attended any of these meetings of this organization?

A. Yes, the last two.

[fol. 98] Q. That was in what years?

A. 1922 and 1923.

Q. Who was the representative who attended these meetings of the first interstate quarantine conference on behalf of the State of Washington, do you know?

Mr. Jones: That is objected to as incompetent, irrelevant and immaterial and not within the issues in this case.

Mr. Sharp: They set forth that Mr. Dean who was a representative or member in some capacity of the Department of Agriculture of this State was present at this conference, and that the whole subject of the alfalfa weevil was carefully considered at that convention.

Mr. Jones: What difference could it make?

The Court: The objection will be sustained. Mr. Dean might come here and state some things he learned, but I do not think this is proper and the objection will be sustained.

Mr. Sharp: Exception.

Cross-examination by Mr. Jones:

Q. Mr. Robinson, how long have you been in the employ of the State of Washington?

A. Since 1919, March 1919.

Q. And in the Department you are now in?

A. Yes.

Q. You are now in the Department of Agriculture?

A. Yes.

Q. And what part, if any, did you have in the issuance of the quarantine order Number Four. Did you have anything to do with it?

A. I drew it up after the one drawn by Mr. Dean that was in effect then.

[fol. 99] Q. You mean you followed Mr. Dean's as a copy?
A. Yes.
Q. Did you independent of that make any investigation?
A. No sir. In so far as I have heard the question discussed at these Western Plant Quarantine board meetings.
Q. Did you ever go into Idaho and examine this territory?
A. No sir.
Q. Did you have anybody do it for you?
A. No sir. But Mr. Wicks, the Plant Director, he made a report at these meetings.
Q. You did not have anybody do it?
A. No.
Q. And you drew up this quarantine order No. 4?
A. Yes sir.
Q. The reason you did draw it up, Mr. Robinson, was that a new law had been passed, the law of 1921, and you copied the same order that was issued in 1919? Without any further investigation, and you drew your quarantine boundaries based upon that order and nothing else?
A. I can hardly say without further investigation.
Q. Well, is not that a fact?
A. Well, not just that way.
Q. Is that not a fact.
A. No, it is not just that way. I did make further investigation. I talked with representatives who had been in Idaho and investigated the situation. We did not send them from our Department.
Q. Who were those representatives?
A. Mr. Charles Park, head of the Oregon Commission of Agriculture.
Q. Where is he?
A. State of Oregon.
[fol. 100] Q. What part of Idaho was he interested in?
A. I do not know. It is the counties covered by this quarantine.
Q. Anybody else?
A. Mr. Lee A. Strong, the plant quarantine officer for California.
Q. What part of Idaho is he interested in?
A. I do not remember exactly the part.
Q. Any of the counties that you are interested in here?
A. I do not remember.
Q. Anybody else?
A. I have heard Mr. Wicks, director of the Bureau of Plant industry in Idaho discuss the matter.
Q. Do you know what part of Idaho he recommended the boundaries be drawn?
A. I do. He suggested that we could exclude some of the territory that was already in our quarantine.
Q. Did he draw your lines there?
A. I do not know whether he did or not.
Q. Is it not a fact now, Mr. Robinson, well, you stated that you drew it in compliance with some old regulation drawn in 1919, before the law of 1921 had been passed?

A. Yes.

Q. And outside of this investigation, that is, these hearsay reports from these three that you have mentioned, you did not make any further investigation?

A. Except in so far as I have heard it discussed at those meetings?

Q. You never sent any individuals over there to inspect neither did you go over there yourself?

A. No sir.

Q. Did you know as a matter of fact, or did you know at that time, just what parts of Idaho south of Idaho county were infected or infested with this weevil?

[fol. 101] A. I cannot say that I do know absolutely just which parts are.

Mr. Sharp: I object to this line of evidence because it is not cross-examination. This witness was not called for that purpose at all. If the attorneys for defendant want to put Mr. Robinson on the stand to testify, all right and good, but this was not covered in direct examination in any way and I think it is wholly improper and incompetent.

The Court: Well, he testified to having prepared that order, did he not?

Mr. Sharp: No, he did not testify he prepared the order. All he testified was that he sent that order out.

The Court: I think the gist of his testimony was now, as I recall it, simply the sending of a notice, in his examination in chief. The objection will be sustained.

Mr. Jones: Mr. Robinson, it is so long since you testified in chief, did you testify anything about the propagation and spread of this insect?

A. No sir.

Witness excused.

Mr. F. H. Gloyd, having been heretofore sworn, was recalled by the plaintiff and again testified as follows:

Examination by Mr. Sharp:

Q. Mr. Gloyd did you ever write to Mr. Reaves with regard to attending this hearing?

Mr. Jones: That is objected to as incompetent.

Mr. Sharp: This is preliminary to offering these farmers' bulletins issued by the United States Department of Agriculture. Counsel has interrogated one of the witnesses in regard to it and I ask that the whole bulletin be admitted in evidence, as the same came directly from Mr. Reaves. He has offered in evidence certain excerpts and [fol. 102] without offering the whole bulletin I ask that the whole bulletin as it comes from Mr. Reaves be admitted in evidence and this

testimony is preliminary to showing that this bulletin as it came from Mr. R-aves and as corrected came directly from him.

The Court: I do not think so Mr. Sharp; I think that is purely hearsay.

Mr. Sharp: Now in addition to what has been offered, I would like to offer in evidence with the privilege of offering certified copies later on, at least I would like to offer at this time certified copies of the quarantine order directed against alfalfa hay issued by the Departments of Agriculture of the States of Montana, California and Idaho. I have not certified copies at this time, but would like to furnish the court with certified copies of these orders as a part of the state's case.

The Court: Upon what theory?

Mr. Sharp: Upon the theory that these quarantine orders are equally as drastic if not more drastic and cover the same territory as our order in which they gave their agriculture department power to promulgate similar quarantine orders and after investigation they issued orders similar to ours and covered the same area covered by our quarantine orders.

Mr. Jones: I object to that as incompetent, irrelevant and immaterial to the issues in this case.

The Court: The objection may be sustained. I cannot see what the action of any other state or its officers could possibly have to do with this.

Mr. Sharp: Exception. Plaintiff rests.

[fol. 103] Mr. Jones: If your honor please, the defendant at this time moves the court for a nonsuit and for a judgment of dismissal against plaintiff upon the ground that the evidence adduced at the trial of this case does not warrant the relief prayed for in the complaint of the plaintiff, or any relief at all.

The Court: Do you wish to argue the motion?

Mr. Jones: No, we have gone into that pretty thoroughly. Our grounds would be the same as those urged in the demurrer, except I have not been able to see this decision, but I would like the court to look at it. I will look at it myself when I have an opportunity. The very idea of a quarantine implies is that it is for a definite, limited time. That is the syllabus of the case, and it is the case of Gibson v. LaGrue, 5th Hawaii, 109-116-120. Those are the citations.

The Court: The motion may be denied and an exception allowed.

HARRY SABIN, being a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Jones:

Q. What is your name?
A. Harry Sabin.
Q. What position do you occupy now?
A. State Horticultural inspector.
Q. What State?

A. For the State Department of Agriculture of the State of Idaho.
Q. How long have you been in the employ of the State of Idaho?
A. Since February first, 1920.
Q. Over three years?
A. Yes sir.
Q. What are your duties, Mr. Sabin?
[fol. 104] A. To assist in selecting the various inspectors that were in the Department of Agriculture and to supervise their work and to have investigated any complaints pertaining to injurious insects or plant diseases and to report all infections that come under my notice.
Q. What other infections have you had, occasion to examine the alfalfa weevil?
A. Yes.
Q. I show you an instrument marked Defendant's Identification 1 and ask you if you know what that is?
A. This is a map of Idaho draw——
Q. Of the State of Idaho?
A. Yes, drawn for the purpose of showing the weevil infestation and quarantine areas.
Q. Now you say quarantine area. By that what do you mean?
A. I mean the area quarantined, the area in Idaho quarantined against by other States.
Q. By the State of Washington for instance?
A. By the State of Washington.
Q. Does it also show the area quarantined by the State of Idaho?
A. Yes.

Mr. Jones: We offer this in evidence.
Mr. Sharp: We have no objection, put it in.
The Court: It may be admitted.

(Marked Defendant's Exhibit 1.)

Mr. Jones:

Q. Will you look at that exhibit and kindly point out to the court what if any, if you know, the boundaries of the quarantine of the State of Washington, where that boundary exists.
A. It is all territory in the State south of the red line.
[fol. 105] Q. Now Mr. Sabin, you may state to the court what boundaries south of the line mentioned and described in the quarantine of the State of Washington, if any, quarantine order No. 4 is not infected by the weevil, or not infested by the alfalfa weevil?
Mr. Sharp: That is objected to for the reason that he has not shown that he has any personal knowledge of the location of the weevil.
The Court: I do not think he has qualified to answer that question. He has qualified as an official, stated what his duties were, but there is no evidence here that he has made any investigation.
Mr. Jones: I asked in particular about the alfalfa weevil.
The Court: Well, he has not stated he has been over this territory.

Mr. Jones:

Q. Have you ever been over that territory, Mr. Sabin?
A. Which territory do you have reference to?
Q. Southern Idaho.
A. Yes, I have with the exception of Lemhi county and parts of some of the counties including the territory adjacent to the East of Idaho Falls. I have traveled over it for the last three years in my official work.
Q. Now, Mr. Sabin, do you know of your own personal knowledge what parts of that territory south of the line, south of Idaho county. or the line mentioned and described in quarantine order No. 4 of the State of Washington are not infected by the alfalfa weevil?

Mr. Sharp: I object to that on the ground that witness has not shown himself qualified to testify.
The Court: He may answer that question yes or no; if he knows he can say he does and if not he can say he does not.
A. Yes.

[fol. 106] Mr. Jones:

Q. What parts are not infected.
Mr. Sharp: I object to that for the reason that witness is not qualified. He has not shown whether he knows.
Mr. Jones: Well, if he is not qualified, I do not know where you could get a qualification on the part of any of your officials who drew this quarantine order.
The Court: Well, that is another question. I do not think this witness is qualified to answer that question. If you will read back over his testimony as to what his duties are, there is nothing in it that I recall to show that he has been in touch with this situation, that he has investigated specifically for this purpose or has had anyone investigate for him. He has simply stated that he was an official there and had certain men under him but he has not testified that they have ever made any investigation of this situation.

Mr. Jones:

Q. Have you made any investigation, Mr. Sabin, have you made any investigation as to the alfalfa weevil south of Idaho county?
A. Yes.
Q. For what purpose?
A. To determine if it was present or not.

Mr. Jones: Now, if the court please, we submit that the question is proper.
Mr. Sharp: I object to that.
The Court: What investigation have you made?
A. We made what we call sweeping. We enter the field at a time when the larvæ are most numerous or about the time as near as we can tell, from a history of the insect and make sweepings of the fields beginning with non-infested territory and working away from

[fol. 107] that territory and through fields that are entirely free from infested territory and on such highways as we expect the weevil might have been carried.

Mr. Sharp: I would like to examine as to his qualifications.

The Court: You may proceed.

Mr. Sharp:

Q. Who made these investigations?

A. I did personally, in part of the work.

Q. How many acres did you examine personally

A. I would not say off-hand.

Q. How many days did you spend investigating the weevil?

A. I should say approximately thirty days in the spring and probably fifteen days in July.

Q. What year?

A. I have done that each year, between 1921 and 1922.

Q. You have spent thirty days in April and fifteen days in July in 1921 and 1922?

A. Yes.

Q. And you went over, you went along the highways and took sweepings? What do you mean by sweepings?

A. I took an insect net and worked it backward and forward through the grass in a sort of sweeping motion, that is where we get the idea. In this manner, in order to get the larvæ to drip into the insect net.

Q. How much time did you spend in these counties not included in the order below the Northern line of the Washington quarantined territory?

A. Practically all of the time.

Q. How large an area extending North and South does that cover, that portion, included in the Washington quarantine but not included in your quarantine, how long is it north and south?

[fol. 108] A. Probably two hundred and fifty miles.

The Court: What direction are you speaking of now, the line colored?

A. Yes.

Q. And below this line (indicating)?

A. Yes.

Mr. Sharp: You covered the same territory in 1921 that you covered in 1922?

A. Not all of it.

Q. But part of it?

A. Yes.

Q. And you covered the same territory in April that you covered in July?

Mr. Jones: Now, I object to counsel cross-examining the witness before we conclude our direct examination. Counsel requested that he be permitted to examine with respect to his qualifications.

The Court: I think he has testified sufficiently to determine what sort of investigation he has made. I shall hold that he is qualified to answer the question asked previous to this question.

Mr. Sharp: Exception.

Mr. Jones:

Q. I believe that the witness has already pointed out to the court the territory which he claims is non-infected and for the purpose of the record and to be sure that it is in there I will ask this question: Just point out to the court as the result of your investigations in this case, or, just point out to the court the result of the investigations, your investigation and the investigations of your office——

Mr. Sharp: I object to any investigation from his office. I must insist that his answer be confined to his personal investigation.

[fol. 109] The Court: The objection may be overruled.

Mr. Sharp: Exception.

Mr. Jones:

Q. Will you point out to the court the territory below Idaho county or the line mentioned and described in quarantine order No. 4 of the State of Washington, the territory that is non-infected with the alfalfa weevil?

Mr. Sharp: I object to that unless it is based upon his personal investigation.

The Court: The objection may be overruled.

Mr. Sharp: Exception.

A. Our investigation showed that all of the territory which we covered lying south of the red line here and not shown in the red area was free from alfalfa weevils.

Mr. Jones:

Q. That is shown on exhibit 1?

A. Yes.

Q. Name the counties—the assistant in agriculture suggests that I ask you to name the counties that are below that line that are not infected.

A. Adams county, Valley county, Boise county, Ellinor county and Lemhi.

Q. Mr. Sabin, I notice a dark line drawn here on the exhibit—what does that indicate. I do not know that that is material here, but the answer will indicate.

A. That indicates territory in which there is no alfalfa grown, but other hay, such as clover and timothy.

Q. It shows there is no alfalfa grown above this dark line?

A. Yes.

[fol. 109½] Q. Now, Mr. Sabin, you may state whether or not the portion of defendant's exhibit 1 as shown in red, state what that is?

A. That is a portion of Idaho which we hold is infested with the alfalfa weevil.

Q. Your department?

A. Yes.

Q. You may state whether or not these counties, counties that are covered by red, indicate that they are totally infested with the alfalfa weevil?

A. They are not, only very small areas are in cultivation, some of these counties and these areas that are under cultivation are widely separated and in many places there is no infection.

Mr. Sharp: I object to that on the ground that it has not been shown that he has investigated these territories and his testimony is purely hearsay and I move to strike the answer on that ground.

The Court: Well, as I understand his answer, this map, this portion of the map shown in red is the portion that has been quarantined by his department. I take it that any act by the department under him would be his knowledge sufficient for that purpose.

Mr. Sharp: Exception.

Mr. Jones:

Q. As I under- your testimony, Mr. Sabin, it is that various counties here that are under your quarantine order and are completely covered with the red indicated here, that only a small portion of them are infected?

A. Yes.

Mr. Sharp: I object to that as already having been covered and also it calls for hearsay testimony.

The Court: The motion will be denied.

Mr. Sharp: Exception.

[fol. 110] Mr. Jones:

Q. Mr. Sabin, have you personally inspected the southwest corner there?

A. I made investigations on four different occasions in two different places in that county where alfalfa was grown.

Q. To what extent is that infested if you know?

A. Well sir, I found a slight infect and horn-dale.

Q. Could you state approximately how many acres are infected or infested?

A. It would be a guess, but something over one thousand acres.

Q. And that is the only section that is infected or infested in that entire county?

A. Yes.

Q. That is what county?

A. Owyhee.

Cross-examination by Mr. Sharp:

Q. You say that the portion of Idaho covered by red ink is the portion covered by the quarantine order—what do you mean by the quarantine order?

A. We have a quarantine, we do not permit the shipping of alfalfa hay from the territory shown by the red into the other counties.

Q. It is an absolute embargo of alfalfa hay from counties included in the red to other portions of the State of Idaho.

A. Well, I would not say absolute. On request we have to make an investigation of the section which asks for permission to ship the hay and if found free, they are permitted to ship it.

Mr. Jones: In other words, you issue a certificate?

A. Not for movement of hay within our own state. The exception is based on the fields.

Q. Is this a bulletin or pamphlet issued by your department [fol. 111] showing the various quarantine orders issued against alfalfa weevil by the Department of Agriculture of the State of Idaho?

A. Yes sir.

Q. And by virtue of these quarantine orders the district covered by red here on your map is not permitted to ship alfalfa into other portions of the state?

A. No sir. I do not believe that quarantine intra state shipments are regulated by anything contained in that bulletin there. They may be but I do not believe it.

Q. These are a copy of all your quarantine orders?

A. Of our quarantine orders against products coming from outside of the state.

Q. Will you point out to the court the particular quarantine orders in that book by virtue of which alfalfa hay is prohibited from being moved from the portion of this map indicated in red to other portions of the State of Idaho.

Mr. Jones: I object to that because the witness has already stated that that pamphlet has only to do with shipments from outside the State.

The Court: That is my understanding.

Mr. Sharp: Have you examined this book?

A. Yes.

Q. And you mean to say that the only quarantine orders contained in this book relate to the maintaining of portions of territory outside of the State of Washington—State lines, that is, that is issued by the state of Idaho for the purpose of preventing alfalfa hay and other products from coming in from other districts outside the State of Idaho?

A. To the best of my knowledge.

Q. Have you examined this book?

A. Not entirely and completely.

[fol. 112] Q. How about quarantine order No. 11, are you familiar with that?

Mr. Jones: I object to that as incompetent, irrelevant and immaterial. He has already said that that pamphlet had nothing to do——

The Court: I do not see how this has any bearing on the issue in this case.

Mr. Sharp: It is very important as having a bearing on this witness's testimony. He has shown that—or pretended to show that he knew all about the condition of the weevil, up in this white district that is covered by our quarantine order and said the rest of it is infected. Now I think it is for us to show, if his testimony is valuable for the purpose of showing, that it is not infected, it is valuable to show that the rest of it is infected, and that he has issued these quarantine orders as an official of Idaho.

The Court: It seems to me for the purpose of this case all you need to know is if it is infected. You have covered it by your quarantine orders. You can not say that this testimony has any bearing as to what they have quarantined.

Mr. Sharp:

Q. You do not mean to say that you know, that you have gone over alfalfa fields in this whole area, 200 miles north and south, and 250 miles east and west, in that thirty days in July——

Mr. Jones: I object to that as incompetent, irrelevant and immaterial and not proper cross-examination.

The Court: The objection will be overruled.

Mr. Jones: Exception.

[fol. 113] A. I do not mean to say that I was in every alfalfa field; no.

Witness excused.

Silas L. Smith, being called a witness on behalf of defendant, after having been first duly sworn, testified as follows:

Direct examination by Mr. Jones:

Q. You- name is what?
A. Silas L. Smith.
Q. What is your business or occupation?
A. I am agriculturist for the Union Pacific.
Q. That is the Union Pacific system?
A. Yes.
Q. How long have you occupied that position?
A. Thirteen years.
Q. How long have you been in the agricultural business?
A. Ever since the civil war.

Q. Ever since the civil war, you served in the civil war?
A. Yes sir.
Q. You are at present the agriculturist of the Oregon-Washington Railroad and Navigation Company or for the Union Pacific system?
A. Yes sir.
Q. Do you know anything about the alfalfa weevil?
A. Yes.
Q. Just tell the court something about the alfalfa weevil, something what it is, as to its spread and propagation.

Mr. Sharp: I object to that on the ground that the witness has not shown himself qualified to testify.

Mr. Jones: Well, what experience have you had, Mr. Smith, with regard to the alfalfa weevil?
A. Well, my instructions when I went to work for them was to do anything I could think of to improve the condition of the farmers [fol. 114] and other people in the sections that are served for transportation, and I asked how and they said in any way that I could.

Mr. Sharp: Object to that.
The Court: Oh, that is preliminary.

A. I first heard about the alfalfa weevil from reading in the newspapers, and then I made several trips, different times, through the sections of the country that were said to be infected with the weevil.
Q. In regard to what damage the weevil was doing and what methods they were using to control the weevil?
A. I did them, the same as I did the same was with any other topic, that came up, I consulted the representatives of the various agricultural schools and experimental stations, read their bulletins and then with those as a basis, I questioned the farmers that I came in contact with in those sections where the weevil was prevalent in regard to the amount of damage it was doing, how fast it was spreading, what methods they were using to control it, and what success they had met with in their measures of control.

Mr. Jones:

Q. Now just a moment, were you ever connected with any agricultural college in recent years?
A. The only connection I ever had with any college was when I was employed by the college of the State of Washington as instructor in dairying in the Washington State College at Pullman.
Q. At Pullman?
A. Yes sir.

Mr. Sharp: I object to that as wholly immaterial.
The Court: Let me suggest you get the witness down to personal investigation.

Mr. Jones: Now give your personal investigation?
A. From my personal investigation I found out to my satisfac- [fol. 115] tion that the prevalent opinion in regard to the spread

of the alfalfa weevil and the damage it is doing was vastly exaggerated.

Q. Do you know, Mr. Smith, from your experience and from your personal experience and from reading the bulletins and other literature on the alfalfa weevil, whether or not there has been any instance of the spread of the alfalfa weevil by the railroad companies in shipping?

A. I never have.

Q. Do you know whether or not that is true?

A. I do not know just how I should answer that because I have never met a man yet anywhere that claimed that he knew of the weevil being spread from hay or cars or anything of the kind, and I have asked the question of farmers and shippers and I have asked it of the college men in charge of the work at schools and colleges and asked them if they knew of any instance of its being spread in this way and they all said they did not. Only last week I visited the——

Mr. Sharp: I object to that as hearsay.

The Court: The objection will be sustained.

Mr. Sharp: I move to strike the last answer.

The Court: It will not be considered by the court as evidence, statements of what people have told him, with reference to this, is not evidence in my judgment. The question is whether he knows.

Mr. Jones: Do you know, Mr. Smith, of your own observation, of any spread of the alfalfa weevil from shipping hay?

A. No, I do not.

Q. From your investigation of the alfalfa weevil, Mr. Smith, do you think it would be possible or probable, probable or possible to spread or to start colonies of alfalfa weevils, from shipping alfalfa hay through the State of Washington or any other territory that is not infected?

[fol. 116] A. Decidedly improbable.

Mr. Sharp: I object to that on the ground that the witness is not qualified to express an opinion in the matter.

The Court: It may stand.

Mr. Jones:

Q. Mr. Smith, have you read, or heard read, the testimony of Professor Kincaid?

A. That statement of Kincaid's?

Q. Yes.

A. Yes, I heard it read this morning.

Q. In what or any point do you disagree with him?

Mr. Sharp: I object to that as not being proper cross-examination of their own witness. I do not think it is competent.

Mr. Jones: Well, of course, it is only expediting matters. I can probably go over the whole thing and pick it out here. I do not

see any harm in asking him. Maybe he does not disagree with him. I do not know.

Mr. Sharp: Well, you ask a specific question and I can object to it.

Mr. Jones:

Q. Do you approve of all the statements made by Professor Kincaid regarding the alfalfa weevil?

A. Do I agree with him?

Q. Yes.

A. Certainly not.

Q. In what respect do you disagree?

Mr. Sharp: I object to that as not proper.

The Court: The objection will be sustained.

Mr. Jones: I guess then I will have to go through this from beginning to end.

Q. State whether or not there has been any natural enemy of the [fol. 117] alfalfa weevil found or established in this country?

A. Yes.

Mr. Sharp: I object to that for the reason that witness is not qualified.

The Court: The objection will be sustained. You certainly have not qualified this witness to answer the questions of that kind.

Mr. Jones: Do you know what the natural enemies of the alfalfa weevil are?

A. Yes.

Q. What is it?

A. It is a little fly called the aknuman fly—akunman fly. It was imported—from Italy by the Department of Agriculture and distributed in the Salt Lake Valley.

Q. State whether or not you know any colonies of these actual enemies that have been actually established in the infected districts.

A. All I can say in regard to that is the information I get from asking questions from the farmers in regard to that.

Q. You ever see any of the flies?

A. No sir, I have not been there at the season of the year when they were flying.

Mr. Jones: We offer to show as to what the witness will testify here as to his own personal knowledge from information he has received from the farmers as to the establishment of these natural enemies in the infected districts.

Mr. Sharp: I object to that on the ground that it is purely hearsay if he did testify to it.

The Court: The objection will be sustained.

Mr. Jones: Exception.

[fol. 118] Q. State if you know, Mr. Smith, when the weevil lays, when is the egg laying time?

A. It depends a great deal on the weather. Some time it begins much earlier than others.

Q. When is the main egg laying time?

A. The month of May.

Q. When is the first crop cut?

A. That varies according to the seasons and the localities, anywhere from the last of May up until the first of July.

Q. How long do the eggs remain fertile after the laying?

A. They begin hatching sometimes, if the weather is warm like it is today, in five or six days. If the weather is cold they sometimes will not hatch under twelve or fourteen days.

Q. And if they do not hatch by that time what happens?

A. Well, supposedly they won't hatch at all, if they do not hatch inside of two weeks.

Q. They are not fertile after that time?

A. I never knew of any of them hatching after that time.

Q. Are there any eggs laid by the beetle after the month of May?

A. I have never seen any that was—yes, after the month of May, some in June, but I have never seen any eggs later than the fourth of July. I never saw any eggs later than the fourth of July.

Q. Mr. Smith, do you know of any method by which alfalfa weevil has been spread or propagated excepting by the natural spread from the larva following as the beetles fly—do you know of any colonies that have been established by the spread of the beetle in any other way?

A. No.

Q. Does the literature published by the Department of Agriculture, or the Department of the United States Government reveal any such condition?

[fol. 119] Mr. Sharp: I object to that on the ground that it is calling for literature which counsel himself refused, and object to when it is offered in evidence.

Mr. Jones: I am asking from his reading of any literature.

Mr. Sharp: Certainly if the literature itself is not competent then testimony of that kind is not competent.

The Court: The objection will be sustained.

Mr. Jones: Exception.

Q. Mr. Smith, what becomes of the alfalfa weevil when any noise like a cycle or a mowing machine in the field, what happens to it?

A. They get on the ground just as quick as they can.

Q. What about the stacks of alfalfa hay, where do you find the weevil?

A. On the ground, under the stack.

Q. You do not find any in the top?

A. No. I have made a particular examination and never found any except down on the ground.

Cross-examination by Mr. Sharp:

Q. How did the alfalfa weevil get into Salt Lake City?
A. Nobody knows as far as I have been able to determine.
Q. What is the general impression as to how it got there?

Mr. Jones: I object to that. The witness testified nobody knows.

Witness excused.

Mr. Jones: The defendant rests.

Mr. FRENCH, having been heretofore sworn as a witness on behalf of the plaintiff, was recalled in rebuttal and testified as follows:

Direct examination by Mr. Sharp:

Q. I would like to ask Mr. French if he thinks bills of lading [fol. 120] referred to on that printed sheet there—change that, I would like to ask Mr. French if he has those bills of lading referred to on that printed sheet there, that indicate on that sheet that the point of destination on those bills of lading was Spokane, have you the originals with you?

A. No. Do you mean the bills of lading or the way bills that are issued by the agent at the point of origin? Your consignees would have the original bills of lading.

Q. Have you any evidence or information as to what was done with those particular cars? If you went over this particular list and pointed out the mistakes that were made and said that the point of destination was not Spokane but some place in Idaho—I am asking if you have those original way bills here with you?

A. No. I have not them here but they are a matter of record in our office.

Cross-examination by Mr. Jones:

Q. This exhibit was sent down to you by our office after it had been furnished to us by the State?
A. Precisely.
Q. And you checked over these from your records?
A. Exactly.
Q. That is how you are able to testify from your own records?
A. Yes sir.

Redirect examination by Mr. Sharp:

Q. From your own evidence you found from your own waybills, that it was reconsigned to Spokane?

A. No, they were originally consigned to points in Idaho, I think one point was Kellogg and the Cœur d'Alene.

Witness excused.

Mr. Sharp: The plaintiff rests.
Mr. Jones: The defendant rests.

[fol. 121] Mr. Jones: If there is any question in the court's mind as to whether or not under the pleadings as they now are, we have no right to raise the question of the dereliction on the part of the officers of the State of Washington in their duties in regard to the reasonableness of the investigation of the area under their attempted quarantine, we would like the pleadings to be amended to conform with the proof and to insert an affirmative defense to the effect that the plaintiff did not make a proper or reasonable investigation of the area which they have attempted to quarantine by quarantine order No. 4.

Mr. Sharp: We object to that on the ground that it is an affirmative defense set up on the day of trial when the plaintiff in this case was served way along in May, early in May.

The Court: The amendment will not be permitted at this time. The case is closed and both sides rested. The court was simply informally discussing a certain proposition of law that might be involved in the case with counsel and the reporter was not present.

Mr. Jones: I do not think it is necessary, but was just asking as a measure of precaution here because they have alleged it affirmatively and we have denied it and we have offered proof.

The Court: The court will consider the case upon the pleadings as filed and the evidence as it has gone in. I will dispose of this matter as soon as I can get to it. I cannot tell you exactly when.

Mr. Jones: We desire an exception to your honor's ruling denying us the right to amend.

[fol. 122] The Court: Exception allowed.

Whereupon the case was closed and no further testimony was offered on either side.

[fol. 123] In Superior Court of Thurston County

Judge's Certificate to Statement of Facts

On this 11th day of September 1923, pursuant to due notice of application for settlement and certification of the statement of facts in the foregoing entitled action, the parties to said action appearing by their respective attorneys of record therein, the undersigned Hon. John M. Wilson, Judge of said Court presiding at the trial of said action, now hereby settles the annexed and foregoing Statement of Facts as the statement of facts in said action, and hereby certifies:

That the matters and proceedings embodied in the annexed and foregoing statement of facts, exhibits and other written evidence introduced or offered in evidence upon the trial of said action and filed in said cause and now marked and identified by me as follows: Plaintiff's Exhibits A to G inclusive, and Defendant's Exhibits 1 referred to and identified in Defendant's proposed statement of facts

are matters and proceedings occur-ing in said cause, and the same are hereby made a part of the record therein; and that the same contain all the testimony on which said cause was tried; evidence produced or offered by either of the parties to said action together with all of the objections and exceptions of counsel taken to the reception or rejection of testimony, and the rulings of the court thereon, all documents and instruments in writing introduced or offered in evidence and all the material facts, matters and proceedings heretofore occurring in said cause, and not already a part of the record therein; and the clerk is hereby ordered to attach to the said Statement all of the said original exhibits on file in said cause as herein identified, and which the clerk of this Court is ordered to transmit to the clerk of the Supreme Court.

Done in open court this 11th day of September 1923.

(Signed) John M. Wilson, Judge.

O. K. —— ——, Attorney for Plaintiff.

[fol. 124] IN SUPREME COURT OF WASHINGTON

No. 18271, Department One

THE STATE OF WASHINGTON, Respondent,

v.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, Appellant

OPINION—Filed February 6th, 1924

The state, by its attorney general, commenced this action in the superior court for Thurston county seeking an injunction forbidding the defendant railroad & navigation company from shipping into the state, or through the state except in sealed containers, any alfalfa hay from certain territory of neighboring states in violation of a quarantine order issued and promulgated by the state director of agriculture with the approval of the governor. The defendant demurred to the complaint, which demurrer was by the trial court overruled. The defendant thereupon answered, controverting certain of the facts alleged in the complaint and also pleading affirmative defenses which, for the most part, contain claims of right under federal and constitutional statutory provisions relating to interstate commerce, which had been claimed upon the presentation of the demurrer. Thereafter a trial was had resulting in a decree awarding to the state injunctive relief as prayed for, from which the defendant has appealed to this court.

As we view the controversy, some of the principal contentions here made in appellant's behalf are finally determinable by a consideration of questions arising upon the demurrer to the complaint. This calls for a somewhat extended setting forth of the allegations of the

complaint, the quarantine order made a part thereof and the pro-[fol. 125] visions of Chapter 105 of the Laws of 1921, in pursuance of which the order was issued. The allegations of the complaint and prayer are as follows:

"That during all the times herein mentioned the defendant was and now is a corporation, duly organized and existing under and by virtue of the laws of the state of Oregon, and engaged in maintaining and operating lines of railroad in the states of Idaho, Oregon and Washington, and in Thurston County, Washington, as a public carrier for hire.

"That at all times since June, 1921, and prior thereto, there has existed and now exists in the areas of the states of Utah, Idaho, Wyoming, Oregon and Nevada, hereinafter set forth, an injurious insect popularly called the alfalfa weevil, and scientifically known as the Phytonomus posticus, which said insect feeds upon the leaves and foliage of the alfalfa plant, as a result of which crops of alfalfa are, where such insects exist in large numbers, greatly damaged or totally destroyed; that said insect multiplies rapidly and is propagated by means of eggs deposited by the female insect upon the leaves and stalks of the alfalfa plant; that when the alfalfa plant is cured, the eggs cling to and remain dormant upon the cured alfalfa hay and even in the alfalfa meal, when such hay is converted into meal, and such eggs and live weevils are likely to be carried to any point where such alfalfa hay is transported, such eggs there to germinate and the alfalfa weevil there to be distributed and propagated, and that as a result thereof, the curing of alfalfa hay infected with the said alfalfa weevil, and the transporting of such hay and the meal made therefrom to localities theretofore free from such weevil, may, and commonly does, result in the infection with said weevil of the alfalfa crops at the points to which such alfalfa hay and meal is transported. That when said alfalfa hay and meal produced from crops of alfalfa infected with the alfalfa weevil is transported in common box cars such as are commonly used upon the several railroads in the state of Washington, including defendant, and not placed in sealed containers, said meal and the hay and the dried leaves and foliage therefrom containing said eggs and live weevils is likely to be shaken out and distributed along the route taken by the freight cars in which the same is conveyed and said pest communicated to the agricultural lands adjacent to the said route as a result of the germination of the eggs of the alfalfa weevil upon the hay falling from such freight cars and the falling out of said live weevils. That a proper inspection to ascertain the presence of such weevil eggs in carloads of alfalfa hay or meal would require that every bale of hay and sack of meal contained in such carload or consignment be torn open and a careful inspection made of the stalks and leaves of such alfalfa, and such meal, which method of inspection is necessarily prohibitive in cost and wholly impracticable, and that hence the only practical method of preventing the spreading of the said alfalfa weevil pest into uninfested districts is to prohibit the transportation of alfalfa hay or meal from the districts in which the said alfalfa weevil exists. That said alfalfa weevil is new to and not generally distributed within the state

of Washington. That there is no known method of ridding a district infected with such alfalfa weevil of such pest and that when a district is once infested therewith it always remains thus infested.

"That susequent to June 8, 1921, and prior to September 17, 1921, information was received by the Director of Agriculture of the State of Washington that there was a probability of the introduction of [fol. 126]such alfalfa weevil into the state of Washington and across the boundaries thereof, and the said Director of Agriculture did thereupon proceed thoroughly to investigate said insect and the areas where such pest existed, and from such investigation, did ascertain that such pest existed and was dangerously injurious to alfalfa in the whole of the state of Utah, all portions of the state of Idaho lying south of Idaho county, the counties of Uinta and Lincoln in the state of Wyoming, the county of Delta in the state of Colorado, the counties of Malheur and Baker in the state of Oregon, and the county of Washoe in the state of Nevada, and that the said Director of Agriculture of the state of Washington did thereupon, on or about September 17, 1921, make and promulgate a quarantine regulation and order under the terms of which the said Director of Agriculture did declare and proclaim a quarantine against all of the above described areas and forbid the importation into the State of Washington of alfalfa hay and alfalfa meal (except under the conditions therein contained), and that the said Director of Agriculture did thereupon at once notify the Governor of the State of Washington of such quarantine limits established as aforesaid, and the said Governor of the State of Washington did thereupon approve the same and did thereupon issue his proclamation proclaiming the boundaries of such quarantine as fixed in said order and the nature thereof and the order, rules and regulations prescribed for the maintenance and enforcement thereof, and did thereupon duly publish said proclamation by causing the same to be filed in the office of the secretary of state of the state of Washington, and by causing copies thereof to be transmitted to each of the railroad companies doing business in the state of Washington, and by causing a summary thereof to be published in various newspapers published in the state of Washington, such publication being deemed sufficient and expedient to give proper notice of such quarantine order, and that at all times since said September 17, 1921, said quarantine order and regulation has been and now is in full force and effect, and at all times since September 17, 1921, the defendant has had actual notice of such quarantine order and regulation. That a true copy of said quarantine order is hereby attached, marked, "Exhibit A," and made a part hereof.

"That during the months of January, February, March and April, 1923, the defendant, well knowing of the existence and promulgation of said quarantine order hereinabove described, and in total disregard and violation thereof, caused to be shipped into the state of Washington in common box cars and not in sealed containers, a large number, to-wit, approximately one hundred car loads of alfalfa hay, all of which said alfalfa hay was consigned and shipped, with the knowledge of the defendant, from various points in the state of Idaho lying south of Idaho county in said state of Idaho, and through the

state of Oregon and into the state of Washington in direct violation of said quarantine order hereinabove set forth, and that unless the defendant is enjoined and restrained from so doing, said defendant will continue so to ship alfalfa hay from such quarantine area of the state of Idaho into and through the state of Washington.

"That large quantities of alfalfa are grown and produced in the eastern and central portions of the state of Washington and adjacent to the railroad lines of defendant and particularly the lines of the defendant and the other railroads in the state of Washington over which such shipments of alfalfa hay were shipped and are likely to be shipped in the future, unless an injunction is issued as prayed for in this complaint, and that unless said defendant is enjoined and restrained from continuing to ship such alfalfa hay into the state of Washington from such quarantined areas, the districts where alfalfa [fol. 127] is grown in the state of Washington is likely to and will become infested with such alfalfa weevil pest to the great and irreparable damage of the citizens and residents of the state of Washington engaged in growing and producing alfalfa therein.

"That neither the plaintiff, nor the citizens of the state of Washington engaged in the growing and production of alfalfa have any plain, speedy or adequate remedy at law.

"Wherefore plaintiff prays for judgment against the defendant perpetually restraining and forbidding the defendant, its agents, officers or employees or any of them, from transporting into the state of Washington (or through said state except in sealed containers) any alfalfa hay or any other products forbidden to be imported into the state of Washington by said quarantine order from the areas covered and described in said quarantine order."

The quarantine order made part of the complaint, in so far as we need here notice its terms, reads as follows:

"Quarantine Order No. 4

"Pertaining to the Alfalfa Weevil

"Whereas, It has become known to me that an injurious insect, popularly called the alfalfa weevil, and scientifically known as "Phytonomus posticus", exists and is dangerously injurious to alfalfa in the State of Utah, and in many of the counties in the southern part of Idaho, and in certain counties in the state of Wyoming, to-wit; Uinta and Lincoln; and in a certain county in the State of Colorado, to-wit: Delta; and in certain counties in the State of Oregon, to-wit: Malheur and Baker; and in Washoe County, Nevada.

"Now, therefore, I, E. L. French, Director of Agriculture of the State of Washington, under and by virtue of the authority conferred upon me by Chapter 105, Session Laws of 1921, do hereby declare and proclaim a quarantine against said state of Utah, and all portions of the State of Idaho lying south of Idaho County, and the counties of Uinta and Lincoln in the State of Wyoming; and the

county of Delta in the State of Colorado and the counties of Malheur and Baker in the State of Oregon, and the County of Washoe in the State of Nevada, and forbid the importation into Washington of the following agricultural products and other articles, excepting under conditions and regulations as specified.

"1. Alfalfa hay * * *"

Some other provisions are contained in the order, but for present purposes we are concerned with the order only as an absolute exclusion of alfalfa hay from the state, the shipments of which originate in any of the territory against which the quarantine order runs. The quarantine order is silent on the question of shipments of hay through the state, originating in the territory specified in the order, but the state is not seeking to enjoin shipments passing through the state if they be placed in sealed containers; the theory [fol. 128] of counsel for the state, as we understand them, being that hay passing through the state other than in sealed containers shall be regarded as being shipped into the state. The provisions of Chapter 105, Laws of 1921, which seem necessary to be noticed, read as follows:

"Section 1. The forest, agricultural, horticultural, ornamental and floral trees, shrubs, and plants in the state of Washington, and the products thereof shall be preserved and protected from the ravages of diseases, insects, and animal and weed pests injurious thereto and destructive thereof.

"Sec. 2. The Director of Agriculture shall have the power and it shall be his duty by and with the approval of the Governor to establish and the director shall thereupon maintain and enforce such obligatory quarantine regulations as may be deemed necessary to protect the forest, agricultural, horicultural, ornamental and floral trees, shrubs and plants, and the products thereof in the state of Washington, against contagion or infestation by injurious plant disease insects, or animal or weed pests, by establishing such quarantine at the boundaries of this state or elsewhere within the state, and he may make and enforce, any and all such obligatory rules and regulations as may be deemed necessary to prevent any infected or infested forest, agricultural, horticultural, ornamental and floral trees, shrubs, and plants, and the products thereof in the state of Washington from passing over any quarantine line established and proclaimed pursuant to this act, and all such articles shall, during the maintenance of such quarantine, be inspected by such director or by horticultural or other inspectors thereto appointed, and he and the inspectors so conducting such inspection shall not permit any such article to pass over such quarantine line during such quarantine, except upon a certificate of inspection, signed by such director or in his name by such inspector who has made such inspection. All approvals by the governor given or made pursuant to this act shall be in writing and signed by the governor in duplicate, and one copy thereof shall be filed in the office of the secretary of state and the other in the office of said director before such approval shall take effect.

"Sec. 3. Upon information received by such director of the existence of any infectious plant disease, insect or other animal or weed pest, new to or not generally distributed within this state, dangerous to any plant or commodity or to the interests of the plant industry of this state, or that there is a probability of the introduction of any such infectious plant disease, insect or other animal or weed pests into this state or across the boundaries thereof, he shall proceed to thoroughly investigate same and may establish, maintain and enforce quarantine as hereinbefore provided, and may make and enforce such regulations as are in his opinion, necessary to circumscribe and exterminate such infectious plant diseases, insect or other animal or weed pests and prevent the spread thereof. Such director may disinfect, or take such other action with reference to any trees, shrubs, plants, vines, cuttings, grafts, scions, buds, fruit-pits, fruit, seeds, vegetables or any crops or crop products, and any containers thereof, and any packing material used therewith infested or infected with, or which, in his opinion may have been exposed to infection or infestation by, any such infectious plant diseases, insect or other animal or weed pests, as in his discretion shall seem necessary to carry out and give effect to the provisions of this act. Such director, his deputies and inspectors are hereby authorized to enter upon any ground or premises to inspect the same or to inspect any tree, shrub, [fol. 129] plant, vine, cutting, graft, scion, bud, fruit-pit, fruit, seed, vegetable or other article of horticulture or implement thereof or box or package or packing material pertaining thereto, or connected therewith or that has been used in packing, shipping or handling the same, and to open any such package, and generally to do, with the least injury possible under the conditions to property or business all acts and things necessary to carry out the provisions of this act. The said director shall at once notify the Governor of all quarantine lines established under or pursuant to this act, and if the Governor approve or shall have approved of the same or any portion thereof, the same shall be in effect and the Governor may issue his proclamation proclaiming the boundaries of such quarantine and the nature thereof, and the order, rules or regulations prescribed for the maintenance and enforcement of the same, and may publish said proclamation in such manner as he may deem expedient to give proper notice thereof. * * *

"Sec. 5. When any shipment of * * * agricultural product passing through any portion of the State of Washington in transit, is infested or infected with any species of injurious insects, their eggs, larvae, pupae or animal or plant disease, which would cause damage, or be liable to cause damage to the forests, orchards, vineyards, gardens, or farms of the State of Washington, or which would be or liable to be, detrimental thereto or to any portion of said state, or to any of the forests, orchards, vineyards, gardens or farms within said state, and there exists danger of dissemination of such insects or disease while such shipment is in transit in the State of Washington, then such shipment shall be placed within sealed containers, composed of metallic or other material, so that the same can not be broken or opened, or be liable to be broken, or opened, so as to

permit any of the said shipment, insects, their eggs, larvae, or pupae or animal or plant disease to escape from such sealed containers and the said containers shall not be opened while within the State of Washington.

"Sec. 6. Whenever the director of agriculture declares, promulgates and issues quarantine measures, orders or regulations against any part or portion of this state or any other state or country or section thereof, for the protection of any forest, agricultural, horticultural, ornamental or floral trees, shrubs or plants, and there shall be received in this state, any forest, agricultural, horticultural, ornamental or floral trees, shrubs, or plants, or the raw products thereof, from any part or portion of this state or any other state or country or section thereof, against which the quarantine has been issued as to such commodity, it shall be the duty of the person, or the official of the carrier having such shipment in charge for delivery, unless the same is accompanied by a certificate of inspection and approval by a horticultural inspector of this state, showing that the same was inspected and approved at the initial point of shipment, to notify the horticultural inspector stationed nearest to the point where said shipment is received, of the receipt of such shipment giving the name of the consignor and consignee and stating that such shipment is ready for inspection and delivery. Said notification shall be either by telephone or telegraph, and confirmed by written notice delivered personally to said inspector or to some person of suitable age and discretion at his residence or office, or by mail addressed to said inspector at his place of residence or at his office; and it shall be unlawful for any such agent or person having such shipment in charge to deliver the same to the consignee or to any other person until the same shall have been inspected by a horticultural inspector: Provided, however, That such agent shall not be required to hold such shipment more than forty-eight hours [fol. 130] after notifying the inspector as aforesaid, except in case the notice is given by mail, in which event, such shipment shall be held for such period beyond said forty-eight hours as is ordinarily required for delivery of mail to the address of the inspector."

Other provisions of the law relate to penalties of a criminal nature for its violation. We may observe in this connection, however, that no contention is here made, and apparently was not made to the trial court, that injunction is not a proper available remedy to the state as against the defendant. This brings us to the consideration of the questions here raised and finally determinable upon the demurrer to the complaint.

It is contended in behalf of appellant that the quarantine order is in violation of section 8 of Article I of the Constitution of the United States, in so far as that section gives to Congress power "to regulate commerce * * * among the several states * * *" The argument seems to be that because the quarantine order is in terms an absolute prohibition against the bringing into the state of any alfalfa hay from the territory against which the quarantine order runs, it is in effect an unreasonable and unwarranted interfer-

ence with interstate commerce, conceding that the state may establish reasonable regulations looking to the inspection at the state line of commodities about to enter the state with a view of excluding such as shall be found to be infected in such manner as to endanger persons and property in the state; in other words, that the state does not possess the power to determine that certain territory outside the state is so afflicted with alfalfa weevil that no alfalfa hay coming from such territory can be safely allowed to come into the state because of the probability of our own alfalfa crops becoming infected in the same manner and thereby seriously damaged. Counsel for appellant place their principal reliance upon the decision of the supreme court of the United States in Railroad Co. v. Husen, 95 U. S. [fol. 131] 465, and subsequent decisions of that court of the same import. In that case there was drawn in question a statute of the state of Missouri prohibiting the bringing into that state of certain kinds of cattle, as follows:

"No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State, between the first day of March and the first day of November in each year, by any person or persons whatsoever."

That statute contained certain other provisions, but it did not pretend to define any outside territory quarantined against; nor did it pretent to differentiate between cattle afflicted with contagious or infectious diseases and cattle that were not so afflicted. All cattle of the kinds specified were indiscriminately excluded. Holding that this Missouri statute was void as an attempted interference with interstate commerce, Mr. Justice Strong, speaking for the court, said:

"Many acts of a State may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule for conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or inter-state commerce. * * *

"Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March

1 and Dec. 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."

The later decision of the supreme court of the United States in Schollenberger v. Pennsylvania, and Paul v. Pennsylvania, 171 U. S. [fol. 132] 1, the famous oleomargarine cases, is also relied upon by counsel for appellant. The statute of Pennsylvania there drawn in question purported to prohibit shipment into the state of Pennsylvania of oleomargarine, manifestly for no other reason than that it was oleomargarine, and that its coming into the state would, in some manner not made clearly apparent, be detrimental to the state. The supreme court of the United States upon a writ of error from the supreme court of Pennsylvania held that Oleomargarine could not be so arbitrarily excluded from shipment into Pennsylvania, it being a lawful subject of interstate commerce in such shipment, and the court being able to take judicial notice of the fact that as an article of food it was not detrimental to health, though recognizing that the state might by inspection regulations see that it came into the state only in a pure and wholesome condition. These decisions, and others of the same import relied upon by counsel for appellant, we think, deal with a problem quite different from the one before us.

Here we have our state authorities acting in pur*usa*nce of a law of the state, making and promulgating a quarantine order prohibiting an agricultural product from coming into the state solely because of the danger of a like agricultural product produced in our state becoming infected therefrom and resulting in the probable ultimate destruction of that product as a resource of our state. In Rasmussen v. Idaho, 181 U. S. 198, there was drawn in question a statute of that state and a proclamation of the Governor issued in pursuance thereof, which proclamation read as follows:

"Whereas, I have received statements from reliable wool growers and stock raisers of the State of Idaho, said statements being supplemented by affidavits of reputable persons, all to the effect that the disease known as scab or scabbies is epidemic among sheep in certain localities or districts, viz., in the county of Cache, State of Utah; the county of Box Elder, in the State of Utah; and the county of Elko, in the State of Nevada; and,

"Whereas, it is known that sheep from said districts are annually moved, driven or imported into the State of Idaho, and if so moved [fol. 133] would there'y spread infection and disease on the ranges and among the sheep of this State, which act would result in great disaster:

"Now, therefore, I, Frank Steunenberg, governor of the State of Idaho, by virtue of authority in me vested, and after due consultation

with the state sheep inspector, do hereby prohibit the importation, driving or moving into the State of Idaho of all sheep now being held, herded or ranged within said infected districts, viz., the county of Cache, in the State of Utah; the county of Box Elder, in the State of Utah, and the county of Elko, in the State of Nevada, or which may hereafter be held, herded or ranged within said infected districts, for a period of sixty days from and after the date of this proclamation; after the termination of said sixty days sheep can be moved into this State only upon compliance with the laws of the State of Idaho regarding the inspection and dipping of sheep."

Holding that this was a lawful exercise of the police power of the state and not an undue or unreasonable interference with interstate commerce, Mr. Justice Brewer, speaking for the supreme court, said:

"Plaintiff in error relies largely on Railroad Company v. Husen, 95 U. S. 465. In that case the validity of an act of the State of Missouri was presented. The act provided that 'no Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State between the first day of March and the first day of November in each year by any person or persons whatsoever.' It was held to be in conflict with the constitutional grant of power to Congress to regulate commerce between the States. In the opinion the police power of the State, the power by which the State prevents the introduction into its midst of noxious articles, was fully recognized, but attention was called to the fact that there was an absolute prohibition of the bringing in of Texas, Mexican or Indian cattle during eight months of the year, without reference to the actual condition of the cattle, * * *

"It will be perceived that the act was an absolute prohibition operative during eight months of each year. It was an act continuous in its force; provided for no inspection, and was predicated on the assumption that the State had the right to exclude for two thirds of each year the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.

"In the case before us the statute makes no absolute prohibition of the introduction of sheep, but authorizes the Governor to investigate the condition of sheep in any locality, and, if found to be subject to the scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the State as shall seem to him, after conference with the state sheep inspector, to be necessary. The executive acted on the authority thus conferred, and, after consultation with the state sheep inspector and examination of the matter, found that the scab was epidemic in certain localities in Utah and Nevada, and that if sheep from those localities were moved therefrom into Idaho they would spread infection and disease among the sheep of the State, and thereupon forbade the introduction of sheep from such localities for the space of sixty days. It will be perceived that this is not a continuous act, operating year after year [fol. 134] irrespective of any examination as to the actual facts, but is one contemplating in every case investigation by the chief executive of the State before any order of restraint is issued. Whether

such restraint shall be total or limited and for what length of time, are matters to be determined by him upon full consideration of the condition of the sheep in the localities supposed to be affected. The statute was an act of the State of Idaho contemplating solely the protection of its own sheep from the introduction among them of an infectious disease, and providing for only such restraints upon the introduction of sheep from other States as in the judgment of the State was absolutely necessary to prevent the spread of disease. The act, therefore, is very different from the one presented in Railroad Co. v. Husen, supra, and is fairly to be considered a purely quarantine act, and containing within its provisions nothing which is not reasonably appropriate therefor."

In Smith v. St. Louis and Southwestern Ry. Co., 181 U. S. 248, there was drawn in question a statute of the state of Texas and a proclamation of the governor of that state issued in pursuance thereof, which proclamation read in part as follows:

"Whereas, the Live Stock Sanitary Commission of Texas has this day recommended the adoption of the following regulations:

"* * * The Texas Live Stock Commission having reason to believe that charbon or anthrax has or is liable to break out in the State of Louisiana, from this time forth until the 15th day of November, 1897, no cattle, mules or horses are to be transported or driven into the State of Texas from the State of Louisiana. The Live Stock Sanitary Commission of the State of Texas hereby order that any violation of any of the aforesaid rules and regulations by moving of any cattle, mules or horses north of said bayous, or out of Louisiana into the State of Texas, is contrary to said rules and regulations, and shall be an offence and punishable as provided by the laws of the State of Texas:

"Now, therefore, I, C. A. Culberson, Governor of Texas, in conformity with the provisions of chapter 7, title 102, of the Revised Statutes of Texas of 1895, do hereby declare that the quarantine lines, rules and regulations set forth in the above-recited order of the Live Stock Sanitary Commission of Texas shall be in full force and effect from and after this date."

Mr. Justice McKenna, following a review of the court's decisions in Railroad Co. v. Husen and other similar cases, speaking for the court, holding this to be a lawful exercise of the state's police power not unduly or unreasonably interfering with interstate commerce, said:

"The exclusion in the case at bar is not as complete as in the cited cases. That, however, makes no difference if it is within their principle, and their principle does not depend upon the number of States which are embraced in the exclusion. It depends upon whether the police power of the State has been exerted beyond its province—exerted to regulate interstate commerce—exerted to exclude, without discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any* [fol. 135] *proper quarantine*. The words in italics express an im-

portant qualification. The prevention of disease is the essence of a quarantine law. Such law is directed not only to the actually diseased but to what has become exposed to disease. * * * The good faith and sincerity of the Texas officers cannot be doubted, and the statutes under which they acted cannot be justifiably complained of. The regulations prescribed are complained of, but are they not reasonably adaptive to the purpose of the statutes—not in excess of it? Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against. As the Supreme Court of Tennessee said: 'The necessities of such cases often require prompt action. If too long delayed the end to be attained by the exercise of the power to declare a quarantine may be defeated and irreparable injury done.'

"It is urged that it does not appear that the action of the Live Stock Sanitary Commission was taken on sufficient information. It does not appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. The plaintiff in error relies entirely on abstract right, which he seems to think cannot depend upon any circumstances or be affected by them. This is a radical mistake. It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality. In some cases the circumstance would have to be shown to sustain the quarantine, as was said in Kimmish v. Ball, 129 U. S. 217. But the presumptions of the law are proof, and such presumptions exist in the pending case arising from the provisions of and the duties enjoined by the statute and sanction the action of the sanitary commission and the Governor of the State."

These decisions in the Rasmussen and Smith cases, we think, established these general propositions: (1) A state has the power to exclude from its territory, without specific inspection at the state line, the whole of any commodity sought to be brought into the state from territory which its duly constituted authority has, in pursuance of its law, in good faith found and decided to be so afflicted with some blight or disease as will probably, by the bringing of the given commodity into the state, result, by infection, in material injury to a considerable portion of the property within the state, especially when such property liable to be so infected is in a relatively large measure one of the resources of the state; (2) Such finding and decision of the duly constituted authority of the state made as provided by its law is prima facie sufficient to support such exclusion of the given commodity coming from any portion of such territory, and that the burden of showing otherwise rests upon the one who attacks the validity of such determination in so far as the [fol. 136] invalidity of such determination is rested upon alleged insufficient facts to support its reasonableness. Viewed in the light of the allegations of the complaint above quoted and this presumption, we think the finding, decision and quarantine order of exclusion with reference to shipments of alfalfa hay originating in the territory quarantined against, is not in violation of any of the

appellant's rights claimed under the commerce clause of the federal constitution.

It is further contended in behalf of appellant that Chapter 105 of the Laws of 1921 and the quarantine order made in pursuance thereof are rendered ineffectual because of legislation upon the subject-matter thereof having been enacted by Congress; this, upon the theory that such enactment has resulted in superseding all exercise of the power of the state with reference to the subject-matter. Section 8760 of the United States Compiled Statutes, being Section 8 of the act of August 20, 1912, as amended by the act of March 4, 1917, is invoked by counsel for appellant in support of this contention. That section, in so far as it is necessary to here notice its language, reads:

"The Secretary of Ariculture is authorized and directed to quarantine any State, Territory, or District of the United States, or any portion thereof, when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and throughout the United States; and the Secretary of Agriculture is directed to give notice of the establishment of such quarantine to common carriers doing business in or through such quarantined area, and shall publish in such newspapers in the quarantined area as he shall select notice of the establishment of quarantine. That no person shall ship or offer for shipment to any common carrier, nor shall any common carrier receive for transportation or transport, nor shall any person carry or transport from any quarantend State or Territory or District of the United States, or from any quarantined portion thereof, into or through any other State or Territory or District, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine except as hereinafter provided."

This law, it may be conceded, was enacted by Congress looking to [fol. 137] the regulation of interstate commerce in so far as horticultural and agricultural products therein mentioned are concerned. We are not advised of any quarantine regulation ever having been made or promulgated with reference to alfalfa hay or alfalfa weevil by the Secretary of Agriculture of which we may take judicial notice. Nor are we advised by proof, of any such regulation. So this contention is to be considered by us in view of the allegations of the complaint and the provisions of section 8760 above quoted. In other words, it is a question determinable upon the demurrer to the complaint, and we think is answered in favor of the state in this case by the decision of the supreme court of the United States in Missouri Pacific Ry. v. Larabee Mills, 211 U. S. 612. In that case there was drawn in question local railway switching regulations of the state of Kansas; which regulations, while local, were in the respect drawn in

question, of such nature as to be incident to interstate commerce, to the extent that the federal interstate commerce commission could have superseded them in so far as the han lling of interstate car shipments were concerned, by their own regulation, which, however, they did not do. After reviewing a number of the court's previous decisions with a view of demonstrating that such local regulations, though incident to interstate commerce, were not rendered nugatory by the mere giving of the power of regulation to the federal interstate commerce commission, they not having acted in that behalf, Mr. Justice Brewer, speaking for the court, said:

"On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State. It is not contended that the commission has taken any action in respect to [fol. 138] the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed."

It seems to us that just as the interstate commerce commission had not assumed to act with respect to the local matter incident to the interstate commerce there drawn in question, and that therefore the federal government had not assumed to act with reference thereto; so the Secretary of Agriculture of the United States has not assumed to act under Section 8760 above quoted with reference to the preventing of the possible spread of the alfalfa weevil as a pest, and that therefore the federal government has not assumed to act with reference thereto. We are of the opinion that the federal government has not assumed control of the subject-matter in question to the exclusion of state authority with reference thereto.

Some contention is made and briefly argued that Chapter 105, under which the quarantine order here in question was issued, is only an inspection quarantine law; that is, that the director of agriculture is by its terms only authorized to prevent the bringing of shipments of alfalfa hay within the state upon a specific inspection of each particular shipment at the state line and a determination that any such shipment is infected to the extent of warranting its exclusion, and is not authorized to exclude all shipments solely because of their coming from territory without the state against which the quarantine order runs. There are, it is true, a number of provisions in Chapter 105 above quoted which relate to, and in a meas- [fol. 139] ure regulate, inspections to be made of agricultural products about to enter the state, with a view of excluding them, if found infected in such manner as to become dangerous to agricultural products of the state. Looking to the provisions of Chapter 105 as a whole, however, we think that they do not call for such a narrow construction. In Section 2, we find the director of agriculture, upon the approval of the governor, given power to "maintain and enforce such obligatory quarantine regulations as may be deemed necessary to protect the forest, agricultural, horticultural, ornamental and floral trees, shrubs, and plants, and the products thereof in the state of Washington, against contagion or infestation by injurious plant disease insects * * *." This, we think, is a sufficiently broad power to enable the commissioner of agriculture, with the approval of the governor, to exclude entirely, without the necessity of specific inspection at the state line of each particular shipment, the bringing into the state of alfalfa hay from territory outside the state infected with alfalfa weevil as found, decided and ordered. This brings us to a consideration of those questions arising upon the trial and not finally determinable upon the demurrer to the complaint.

It is contended that the quarantine order is without effect because not properly promulgated or evidenced to the public by proclamation of the governor. Referring to the language of Section 3 near the concluding portion thereof, it appears that upon the making of the quarantine order,

"The said director shall at once notify the Governor of all quarantine lines established under or pursuant to this act, and if the Governor approve or shall have approved of the same or any portion thereof, the same shall be in effect and the Governor may issue his proclamation proclaiming the boundaries of such quarantine and the nature thereof, and the order, rules or regulations prescribed for the maintenance and enforcement of the same, and may publish said proclamation in such manner as he may deem expedient to give proper notice thereof."

[fol. 140] It seems by the very terms of the statute that the quarantine order shall be in effect upon its making and approval by the governor, and that the contemplated proclamation by the governor is not necessary to the validity or going into effect of the order. Re-

ferring to the concluding language of section 2, we find that the order is to be filed in the office of the secretary of state. This the proof shows was done before any attempt was made to enforce it; and besides, the order was approved by the governor, which approval was endorsed thereon immediately following the signature of the director, though no formal proclamation in the convention sense seems to have been issued by the governor. We think the approval of the order by the governor in this manner and the filing of it in the office of the secretary of state was in any event a sufficient proclaiming of it by the governor to render it valid and effective. To what extent the order should thereafter be published, it seems clear by the language of section 3, was wholly a matter within the governor's discretion. The proof shows that appellant and all of the other railroad companies of the state were given actual notice of the order by being furnished copies thereof. We think appellant cannot now be heard to say that the quarantine order was ineffectual for want of proclamation thereof by the governor. The following authorities lend support to this conclusion:

Mackin v. State, 62 Md. 244;
Cushing v. Hartwig, 138 Mo. App. 114;
Dickinson, Auditor, v. Page, 120 Ark. 377.

Touching the branch of the case which counsel for appellant in their brief call "the merits," they contend that:

"The evidence shows that the quarantine order was issued without proper investigation and that it is an unreasonable exercise of the police power of the state."

Assuming for argument's sake that such questions, which manifestly are questions of fact, may be considered in this case as they could [fol. 141] be were this a direct action by appellant by a suit in equity attaching the quarantine order as being an unreasonable and unwarranted interference with interstate commerce, as was done in Smith v. Lowe, 121 Fed. 753, we deem it sufficient to say that the evidence convinces us that the order is not an unreasonable or unwarranted interference with interstate commerce, in that it was issued and promulgated without proper and sufficient investigation on the part of the commissioner of agriculture, or in the absence of the existence of facts reasonably warranting its issuance and promulgation. That the alalfa weevil has become a serious menace to the alfalfa crop of certain of the northwestern states, comparatively near neighbors of the state of Washington, is, we think, rendered plain by the evidence in this record. That shipments of alfalfa hay into or through the state of Washington in open cars or boxs cars in the usual manner, originating in the territory against which this quarantine order runs, will be a serious menace to the crop production of alfalfa hay in the state of Washington, one of its comparatively large resources, we think, is also rendered plain by the evidence in this record. That the effectual inspection of each individual shipment of alfalfa hay at the state line coming from the

territory against which the quarantine order runs is wholly impractical, if not absolutely impossible, because of the secretive nature of the infection in the stalks of the alfalfa, we think, is also rendered plain by the evidence in this case. There is some room for arguing that the boundary lines of the district quarantined against as defined in order might have safely somewhat contracted. This argument, however, we are not persuaded, in the light of the evidence, is one that we should yield to and arrive at a different conclusion upon that question from that arrived at by the commissioner of agriculture. Upon all questions of fact touching the reasonableness of the quarantine order we think the weight of the [fol. 142] evidence is on the side of the state.

Some contention is made rested upon the fact that the quarantine order does not make any provision for the shipment of alfalfa hay through the state in sealed containers as contemplated by one of the provisions of section 5 of Chapter 105. The evidence shows that the shipments heretofore made by appellant have been for the most part through the state rather than into the state in the sense of coming into the state with their destination therein. We have noticed that the state is not in this case seeking to restrain, and it was not so decreed, the shipping of alfalfa hay through the state in sealed containers, from the territory quarrantined against. The argument seems to be that, since the order does not in terms prohibit the shipment of hay through the state, appellant should not be enjoined from so doing, even in open cars or box cars;: that is, that it should not be resricted to the making of such shipments in sealed containers. We are of the opinion, however, in the light of the evidence, that the shipping of alfalfa hay in open cars or box cars in the usual manner through the state from the territory quarantined against, is a menace to our growing crop of alfalfa in the state only in a somewhat less degree than such shipments into the state with their destination therein would be; and that the shipment of alfalfa hay through the state other than in sealed containers, is, under the circumstances, in effect a shipment into the state, within the meaning of the order, and is, therefore, as much a violation of the order as a shipment into the state with the destination of the shipment therein would be. Manifestly, a shipment cannot pass through the state without first coming into the state.

The decree of the trial court is affirmed.

Parker, J.

We concur: Main, C. J.; Holcomb, J.; Tolman, J.; Mackinbosh, J.

[fol. 143] IN SUPREME COURT OF WASHINGTON

[Title omitted]

JUDGMENT—April 2, 1924

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 2d day of April, A. D. 1924, on motion of John H. Dunbar Esquire, of counsel for respondent considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; the petition for rehearing denied and that the said State of Washington have and recover of and from the said Oregon-Washington Railroad & Navigation Co. and from National Surety Co. the costs of this action, taxed and allowed at Eighty-Seven & 40/100 Dollars, and that execution issued therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 144] IN SUPREME COURT OF WASHINGTON

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Jun. 27, 1924

To the Honorable John F. Main, Chief Justice of the Supreme Court of the State of Washington:

Comes now Oregon-Washington Railroad & Navigation Company, a corporation, the defendant and appellant in the above entitled suit, and represents that on the 2nd day of April, 1924, a final judgment was duly entered by the Supreme Court of the State of Washington—that being the highest court of law or equity in said State of Washington—affirming the judgment or decree entered by the Superior Court of the State of Washington in and for Thurston County, in a suit wherein the State of Washington was plaintiff, and the Oregon-Washington Railroad & Navigation Company, a corporation, was defendant, awarding an injunction and costs in favor of the plaintiff.

That this is an action for an injunction brought by the plaintiff against the defendant to enjoin the defendant from shipping into or through (except in sealed containers) the State of Washington, alfalfa hay from certain territory of neighboring States, in violation of a quarantine order known and designated as Quarantine Order No. 4, issued and promulgated by the Director of Agriculture of the State of Washington, with the approval of the Governor of said State of Washington. The defendant demurred to the complaint,

which demurrer was by the said Superior Court overruled. The defendant thereupon answered controverting certain of the facts alleged in the complaint and also pleading affirmative defenses, which for the most part contained claims of invalidity of a statute of said [fol. 145] state, and of an authority exercised under said state and of a right, title, privilege and immunity under federal constitutional and statutory provisions relating to interstate commerce, and federal control and regulation of plants and plant products, which had been claimed upon the presentation of the demurrer. Thereafter a trial was had which resulted in a decree awarding to the State of Washington injunctive relief as prayed for, from which the defendant appealed to the Supreme Court of the State of Washington, which said Court affirmed the decision of the said Superior Court and caused judgment to be entered, as above set forth.

And your petitioner avers that in its said answer it expressly charged that the Act of the Legislature of the State of Washington, approved March 16th, 1921, entitled "An Act to protect forest, agricultural, horticultural, ornamental and floral trees, shurbs and plants, and the products thereof in the state of Washington from the ravages of diseases and insects and animal and weed pests injurious thereto or destructive thereof; to prevent the introduction into this state or the spread within this state of such diseases and insect and animal or weed pests; and providing penalties for violation thereof," and Quarantine Order No. 4, issued and purporting to be issued under and by virtue of the aforesaid Act, were each in conflict with and in contravention and violation of Section 8, Article 1 of the Constitution of the United States, in that said Act, Quarantine Order No. 4, and the action of the Director of Agriculture of the State of Washington, are unlawful regulations of interstate commerce, and in such answer and suit the defendant further contended that the said last named Act and Quarantine Order No. 4, and each of them, were in conflict with and in contravention of a law of the United States known as the Act of August 20, 1912, Chap. [fol. 146] 308, 37 Stat at L. p. 318, entitled "An Act to regulate the importation of nursery stock and other plants and plant products; to enable the Secretary of Agriculture to establish and maintain quarantine districts for plant diseases and insect pests; to permit and regulate the movement of fruits, plants and vegetables therefrom and for other purposes," and especially Section 8 of said Act as amended March 4, 1917, Chap. 179, 39 Statutes at Large, page 1165. In that said act of the legislature of the State of Washington and said quarantine Order No. 4 were each of them an invasion of a field already covered by said federal law, as above set forth, and which said Federal Act superseded the State legislation and all action thereunder, as hereinbefore set forth. Such Act of the Washington Legislature, together with all orders issued thereunder, were null and void, and the administration and application of such Act and Orders thereunder to the defendant and appellant and its property, were illegal and invalid.

The Superior Court of the State of Washington upheld said Act

and the Order issued thereunder, and decided them to be not in conflict with Section 8, Article I of the Constitution of the United States, and also decided that the Federal Government had not assumed control of the subject matter of the action to the exclusion of State authority with reference thereto, and, therefore, said Superior Court granted a judgment or decree to the plaintiff as prayed for in its complaint; and the Supreme Court of the State of Washington affirmed the judgment or decree of the Superior Court, and thereby decreed against the right, title, privilege and immunity thus specially set up and claimed by the petitioner. Petitioner shows that the said judgment and decision and interpretation of such Act of the Legislature of the State of Washington, and the Order issued thereunder, were and are repugnant to said Federal constitution and the laws of the United States.

And your petitioner further avers that in the aforesaid judgment or decree and proceedings, certain errors were committed to the [fol. 147] prejudice of your petitioner, all of which more fully appears from the assignment of errors which is filed herewith.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays that it may be allowed a writ of error in said cause, and that said cause be transmitted to the Supreme Court of the United States at Washington, to determine said errors, and that proper orders touching the security required of your petitioner may be made; and your petitioner will ever pray.

A. C. Spencer, Pittock Block, Portland, Oregon; Henry W. Clark, 120 Broadway, New York City; Bogle, Merritt & Bogle, E. I. Jones, R. A. Jordan, Central Building, Seattle, Washington, Attorneys for Appellant.

[fols. 148 & 149] Bond on Writ of Error for $1,000—Approved and filed June 26, 1924; omitted in printing

---

[fol. 150] In Supreme Court of Washington

[Title omitted]

Assignment of Errors—Filed Jun. 27, 1924

Now comes the above named plaintiff in Error, Oregon-Washington Railroad & Navigation Company, a corporation, and files herewith its petition for a writ of error and says, that in the record and proceedings in the above entitled suit and in the rendition of the final judgment and decree therein, manifest errors have intervened to the prejudice of the Plaintiff in Error, and for the purpose of having same reviewed in the Supreme Court of the United States, makes the following assignment of errors:

I

The Supreme Court of the State of Washington erred in affirming the ruling of the Superior Court in overruling the demurrer to the complaint, for the reasons and upon the grounds that the Act of the Legislature of the State of Washington, approved March 16th, 1921, Laws of Washington, 1921, page 308, entitled "An Act to protect forest, agricultural, horticultural, ornamental and floral trees, shrubs and plants, and the products thereof in the state of Washington, from the ravages of disease and insects and animal or weed pests injurious thereto or destructive thereof; to prevent the introduction into this state or the spread within this state of such diseases and insect and animal pests; and providing penalties for violation thereof", and Quarantine Order No. 4 issued and purporting to be issued there under by the Director of Agriculture of the State of Washington, and each of them are invalid and in conflict with Section 8 Article I of the constitution of the United States, which gives to Congress power to regulate commerce among the several states.

[fol. 151]

II

The Supreme Court of the State of Washington erred in holding that Quarantine Order No. 4 issued by the Director of Agriculture of the State of Washington, was valid and not in conflict with and in violation of Section 8, Article I of the Constitution of the United States, which gives to Congress power to regulate commerce among the serveral states.

III

The Supreme Court of the State of Washington erred in not sustaining the claim of the defendant that the power, authority and act of the Director of Agriculture of the State of Washington in issuing Quarantine Order No. 4 was in conflict with Section 8, Article I of the Constitution of the United States, for the reason that such power, authority and act was an illegal and unwarranted regulation of commerce among the states, and was, therefore, null and void.

IV

The Supreme Court of the State of Washington erred in the above entitled suit in holding that the Act of the Legislature of the State of Washington, approved March 16, 1921, Laws of Washington 1921, page 308, entitled "An Act to protect forest, agricultural, horticultural, ornamental and floral trees, shrubs and plants, and the products thereof in the State of Washington, from the ravages of diseases and insects and animal or weed pests injurious thereto or destructive thereof; to prevent the introduction into this state or the spread within this state of such diseases and insect and animals or weed pests; and providing penalties for violation thereof." and the authority exercised thereunder by the Director of Agricul-

ture of the State of Washington, as evidenced by the issuance of quarantine Order No. 4, was valid and not in conflict with the Act of Congress of August 20th, 1912, Chapter 308, Statutes at Large, page 318, entitled "An Act to regulate the importation of nursery stock and other plants and plant products; to enable the Secretary of Agriculture to establish and maintain quarantine dis-[fol. 152] tricts for plant diseases and insect pests; to permit and regulate the movement of fruits, plants and vegetables therefrom, and for other purposes," and especially section 8 of said act as amended March 4, 1917, Chapter 179, 39 Statutes at Large, page 1165; and the Supreme Court of the State of Washington in such case erred in holding that the Federal Government had not assumed control of the subject matter of the action, to the exclusion of the State authority with reference thereto.

V

The Supreme Court of the State of Washington erred in affirming the judgment or decree of the trial court by the terms of which a perpetual injunction is granted the plaintiff as against the defendant, notwithstanding any future modification or amendment of said Quarantine Order No. 4, provided the judgment is not in conflict with Quarantine Order No. 4 as amended or modified, for the reason and upon the ground that said judgment or decree is invalid and in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting the State from depriving any person of his property, without due process of law.

VI

The supreme Court of the State of Washington erred in holding that the evidence in said action did not show that said quarantine order No. 4 was issued without proper investigation on the part of the Director of Agriculture of the State of Washington.

VII

The Supreme Court of the State of Washington erred in affirming the judgment or decree of the trial court, and in entering a final judgment and decree for costs and disbursements in favor of the defendant in error.

VIII

The Supreme Court of the State of Washington erred in not re-[fol. 153] versing the judgment or decree of the superior court and in not remanding said cause to the trial court with instructions to enter a decree therein dismissing said suit and awarding the defendant a judgment for its costs and disbursements of the action.

IX

The Supreme Court of the State of Washington erred in failing to hold that the Director of Agriculture of the State of Washington

was without jurisdiction to issue Quarantine Order No. 4 and in not holding that the Secretary of Agriculture of the United States then had and now has exclusive jurisdiction under the constitution and statutes of the United States to act with respect to the matters contained in said Quarantine Order No. 4.

Wherefore, for these and other manifest errors appearing in the record, the said plaintiff in Error, Oregon-Washington Railroad & Navigation Company, prays that the said judgment of the Supreme Court of the State of Washington be reversed and held for naught, and that said cause be remanded to the superior court of the State Washington in and for Thurston County with instructions to dismiss the complaint and to award the plaintiff in error its costs, and for such further proceedings in said cause as may be determined by said Supreme Court of the United States to the end that justice may be done in the premises.

A. C. Spencer, Pittock Block, Portland, Oregon; Henry W. Clark, 120 Broadway, New York City; Bogle, Merritt & Bogle, E. I. Jones, R. A. Jordan, Central Building, Seattle, Washington, Attorneys for Plaintiff in Error.

[fol. 154] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed June 27, 1924

The above entitled matter came on to be heard upon the petition of the above named defendant and appellant, Oregon-Washington Railroad & Navigation Company, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Washington, and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered on April 2nd, 1924, may be sent to the Supreme Court of the United States, and on considering the said petition, this Court desiring to give the petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented:

Now, therefore, it is ordered by the undersigned, Chief Justice of the Supreme Court of the State of Washington, that the writ of error prayed for by the above named defendant and appellant be and the same is hereby allowed, and that the said defendant and appellant file a cost bond in the sum of One Thousand Dollars ($1,000.00).

It is further ordered that the bond presented by said petitioner be and the same is hereby approved.

In testimony whereof, witness my hand this 27th day of June, A. D. 1924.

John F. Main, Chief Justice of the Supreme Court of the State of Washington.

[fol. 155] IN SUPREME COURT OF WASHINGTON

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 30, 1924

To C. S. Reinhart, Clerk of the above entitled Court:

Please prepare for removal to the Supreme Court of the United States upon writ of error from the Supreme Court of the United States to the Supreme Court of the State of Washington of the above entitled cause, a true, full and correct transcript of the record, the assignment of errors, and of all proceedings in the above entitled cause.

A. C. Spencer, Pittock Block, Portland, Oregon; Henry W. Clark, 120 Broadway, New York City; Bogle, Merritt & Bogle, E. I. Jones, R. A. Jordan, Central Building, Seattle, Washington, Attorneys for Appellant.

[fol. 156] IN SUPREME COURT OF WASHINGTON

EXHIBIT IN EVIDENCE

Quarantine Order No. 15

Pertaining to the Alfalfa Weevil

(Re-enacting and Extending Quarantine Order No. 4)

Proclamation

Whereas, the Director of Agriculture of the State of Washington has this day promulgated with the approval of the Governor, the following quarantine order and rules and regulations, to-wit:

Whereas: the fact has been determined by the Director of Agriculture that an insect injurious to alfalfa and other forage and cover crops, known as alfalfa weevil (Phytonomus posticus, Gyll.), new and not heretofore prevalent or distributed in the State of Washington, exists in the states of Utah and Wyoming, and in all of the counties of Idaho lying south of Idaho County, in said state, and in certain counties in the state of Colorado, to-wit: Delta Gunnison and Montrose, and in certain counties in the state of Nevada, to-wit: White Pine and Washoe, and in certain counties in the state of Oregon, to-wit: Malheur and Baker, and in a certain county in the State of California, to-wit: Sierra county, all of which being hereafter designated as infested territory, and that alfalfa hay and other hay and cereal straw, alfalfa meal, alfalfa seed, salt grass, packing, baggage, tents or other Cha-tauqua, Circus, Carnivals or construction camp equipments emigrant movables, household effects, household implements, camp-

ing effects, camping implements, live stock, potatoes, nursery stock, used bags and other containers, that have been used in the milling, baling, harvesting, or threshing of alfalfa, railroad cars, automobiles, automobile trailers, trucks and other vehicles are liable to be carriers of said Alfalfa weevil into territories otherwise free from this pest.

Now, therefore, I, E. L. French, Director of Agriculture of the State of Washington, under and by virtue of the authority conferred upon me by law do hereby declare that it is necessary, in order to prevent the introduction of said alfalfa weevil into the State of Washington that a quarantine be and the same is hereby established at the boundaries of the State of Washington, against said alfalfa weevil, all alfalfa hay and other hay and cereal straw, alfalfa meal, alfalfa seed, salt grass packing, baggage, tents or other Chartauqua, circus, Carnival or construction camp equipments, emigrant movables, household effects, household implements, camping effects, camping implements, live stock, potatoes, nursery stock, used alfalfa meal milling machinery, and all machinery, implements, bags, and other containers that have been used in the milling, baling, harvesting or threshing of alfalfa, railroad cars, automobiles, automobile trailers, trucks, and other vehicles from said infested territory except as hereinafter provided.

Regulation 1. No alfalfa hay or other hay or cereal straw or alfalfa meal that has been grown, manufactured or stored in the said infested territory shall be brought or shipped into or through the State of Washington for any purpose whatsoever. This regulation shall not be deemed to prohibit the shipment of such hay, straw or meal [fol. 157] through the state in sealed containers as provided by section 5, Chapter 105, Laws of 1921.

Regulation 2. The material known locally in the state of Utah as "Salt grass packing shall not be shipped or brought into the State of Washington unless each such shipment is accompanied by an official certificate signed by the state inspection officer of the state in which such shipment originated, certifying that all of the following requirements have been complied with, to-wit: That the material in the shipment was cut between the dates of October 1, and April 1; that the raking, shocking, stacking, baling or shipping of this material was not allowed until the maximum daily temperature of the season had fallen below sixty degrees Fahrenheit, and that none of the material in the shipment had been held in the field from one season to another.

The use of such salt grass as a packing material in shipments of fruits, crockery and other materials shall be permitted, provided it has been cut and removed from the field between October 1, and April 1, as above specified and stored in warehouses remote from alfalfa fields, alfalfa hay or other suspected materials.

Regulation 3. Potatoes shall not be shipped or brought into the State of Washington from such infested territory unless accompanied by an official certificate signed by the state inspection officer of the state in which potatoes originate certifying that all potatoes in the

shipment have been passed over a screen immediately prior to loading into car, placed in fresh clean sacks and packed in cars that are free from Alfalfa hay or other hay or cereal straw.

Regulation 4. No nursery or ornamental stock or other plants shall be imported or brought into the State of Washington, from the said infested territory unless the same are packed in fresh shavings, excelsior, or other suitable packing (except hay or straw), and unless each such shipment be accompanied by an official certificate of a state inspection officer of the state in which such shipment originated certifying that each package in the shipment was fumigated for a period of one hour for alfalfa weevil in an air tight enclosure subsequent to being boxed, baled or packed for shipment, with cyanide of potassium or sodium at the rate of one ounce to each one hundred cubic feet of space.

Regulation 5. No greenhouse grown plants shall be shipped or brought into Washington unless accompanied by a certificate signed by the state inspector or qualified deputy of the state in which the shipment originates, certifying that the shipment is and has been kept free from contamination with the alfalfa weevil and that the packing material has been subjected to the above fumigation requirements as to nursery stock.

Glassware and dishes packed in straw shall not be brought or shipped into the state of Washington, when said packing material was shipped into the infested territory from uninfested territory unless said shipments are each accompanied by the affidavit of the shipper and certificate of a qualified inspector of the infested state where such shipment originates that such packing material has been kept in storage free from alfalfa hay or straw or other means of contamination.

Regulation 6. Fresh fruits and vegetables, exclusive of potatoes, shall not be shipped or brought into the state of Washington from said infested territory excepting under the following conditions:

[fol. 158] a. Shipments for Washington to be made only from points designated by the recognized state inspection officers of the state shipping into Washington, said officers to notify the Director of the Department of Agriculture of the State of Washington, by registered mail or by telegraph, of the designation of all such shipping points in the aforesaid infested territory, and notification to be sent and its receipt to be acknowledged before any shipments are made to the state of Washington, from said designated points.

b. Shipments to be repacked from orchard or field boxes into new, clean boxes, or other fresh containers.

c. All wagons or other conveyances used in hauling to the place where repacking is conducted to be kept free from alfalfa hay or other hays, straw, and all other means of contamination.

d. All packing houses to be at all times free of alfalfa hay, other hays, straw and other means of contamination.

e. Each lot shipment shall bear an official certificate of the state from which the shipment originates, stating that it has been inspected and passed in compliance with these regulations.

Regulation 7. Any shipment of hay, straw, alfalfa meal, salt grass packing, potatoes, or nursery or ornamental stock or other plants or materials shipped or brought into the state of Washington, in violation of the provisions of Regulations 1, 2, 3, 4, 5, and 6 hereof shall be immediately destroyed unless the person, firm or corporation then in possession thereof shall at once, at his own expense, send or ship the same out of the state.

Regulation 8. No shipment of household effects, or emigrant movables, tents or other Chautauqua, Circus, Carnival or construction camp equipments, originating in said infested territory shall be brought into the State of Washington by any common carrier, person or persons unless such shipment be accompanied by a sworn statement made in duplicate by the owner or shipper in accordance with the following forms, on blanks which will be furnished to applicants by the inspection official of the state in which shipment originates, one of such duplicates designated as copy No. 1 to be mailed to the chief quarantine officer, Department of Agriculture, Olympia, Washington, and the other of said duplicates designated as copy No. 2 to be delivered to the common carrier agent, with a special certificate appended, to attach to the waybill:

STATE OF ——,
County of ——, ss:

I hereby solemnly swear that I was present during the preparation for shipment of the tents or other Chautauqua, Circus, Carnival or construction camp equipments, household effects or emigrant movables which this affidavit accompanies — (Railroad) ——, at (Station) ——, on (Month, day, year) —— —, ——, constituting (less than) a carload (If carload write initials and car number here) —— [fol. 159] ——, to be shipped to (name of consignee) —— ——, at (Destination) ——, via (Give initials of other lines) —— ——; that no alfalfa seed, nursery stock, vegetables or fruit is included in the shipment and that no hay, straw or grain is included for packing material or any purpose except as food necessary for livestock in transit to the Washington state line, and that said tents or other Chautauqua, Circus, Carnival or construction camp equipments, household goods have been kept free from growing alfalfa and from alfalfa hay, straw or other suspected means of contamination; that when the shipper has preceded and left such goods to follow, an inspection by a duly authorized inspector and a certificate should be required in addition to the affidavit, that the shipment is made up of the following:

Tents or other Chautauqua, Circus, Carnival or construction camp equipments, household goods, farm implements, tools, harness, farm wagons, automobiles (draw a line thru items not included), stands

of bees, live stock (specify) ——, feed for animals in transit (Specify any items not included in previous classification) ——.

—— ——, Shipper or Owner.

Subscribed and sworn to before me, —— ——, a notary Public in and for the state of ——, county of ——, this — day of ——, 192—. —— ——, Notary Public. My commission expires —— —, 192—.

The special certificate from the owner or shipper to be appended to copy No. 2 shall be in accordance with the following form:

I hereby agree to observe explicitly the requirements of the Washington Quarantine Order No. 15 with regard to hay, straw or grain (included as stock or animal feed for use before reaching the Washington state line), tents or other Chautauqua, Circus, Carnival or construction camp equipments, household and agricultural emigrant movables and other materials, and hereby certify that I have mailed this day one copy of the foregoing affidavit to the chief quarantine officer, Department of Agriculture.

(Signature:) —— ——.

Upon the arrival at any common carrier station of any shipment of the articles enumerated in this regulation such shipments shall be held intact until the Director of Agriculture, his deputy or deputies or the state quarantine guardian of the district or county in which such shipment is received, has been notified and a certificate of release issued.

[fol. 160] Regulation 9. It shall be the duty of all common carriers to clean and free of alfalfa hay and other hay and cereal straw, all cars that have been used for the transportation of livestock, or alfalfa hay and other hay and cereal straw in or through any part of the said infested territory before said cars enter the state of Washington.

Regulation 10. Used alfalfa meal milling machinery and other machinery and implements that have been used in the baling, milling, harvesting or threshing of alfalfa shall not be shipped or brought into the state of Washington from the said infested territory except upon compliance with the following requirements:

Person contemplating the importing or bringing into the State of Washington, any of the articles enumerated in this regulation shall first make application to the Director of Agriculture for a permit to do so, stating in the application the name and address of the exporter, the locality from which the shipment is to be made, a description of the articles for which a permit is required, the terminal point of delivery and the name and address of the person in Washington to whom the permit should be sent. Any and all shipments of such machinery and implements heretofore enumerated in this regulation imported or brought into the state of Washington under authority of permit issued by the Director of agriculture shall have

attached to each shipment a certificate signed by the official inspector of the state from which such shipment was made, showing the number of the permit to import and establishing the fact that all machinery and implements included in the shipment have been cleaned and fumigated with hydrocyanic acid gas before being loaded for shipment, the date and place of fumigation, and the amount of cyanide used in fumigation of the shipment covered by the certificate. Any and all shipments of machinery and all implements not accompanied by a certificate as provided for in this regulation shall be refused admittance into the state of Washington, and upon the arrival of any such machinery and implements without a certificate as provided for, the same shall be immediately sent out of the state at the expense of the owner, consignee or agent.

Regulation 11. Automobiles, automobile trailers, trucks and other vehicles from the said infected territory arriving in Washington may be placed in quarantine by the Director of Agriculture, his deputy or deputies, or quarantine guardian of the district or county into which such vehicle arrives until it has been determined by inspection that the same is free from alfalfa weevil.

Regulation 12. Baggage, tents or other Chautauqua, circus, carnival or construction camp equipments, emigrant movables, household effects, household implements, camping effects, camping implements, used farming implements, and other field appliances imported or brought into the state of Washington by other than common carrier transportation from the said infested territory may be placed in quarantine by the Director of Agriculture his deputy or deputies, or quarantine guardian of the district or county into which such articles are imported or brought until it has been determined by inspection that the same are free from alfalfa weevil.

[fol. 161] Regulation 13. Alfalfa seed shall be shipped or brought into Washington from the said infested territory only when contained in bags or containers which have not been previously used in the carrying of alfalfa products other than re-cleaned alfalfa seed.

All deputies of the Director of Agriculture and all state quarantine guardians are hereby empowered to carry out all the provisions of this order.

This quarantine order shall be deemed to be merely an amendment, continuation and re-enactment of Quarantine Order No. 4, insofar as said Quarantine Order No. 4 is not inconsistent herewith.

This Quarantine Order shall take effect on and after this date.

(Signed) E. L. French, Director of Agriculture.

The above Quarantine Order is hereby approved and I proclaim that on and after this date the same shall be in full force and effect.

(Signed) Louis F. Hart, Governor.

Dated April 9, 1924, Olympia, Washington.

[fol. 162] Now, therefore, I, Louis F. Hart, Governor of the State of Washington, in conformity with the provisions of Chapter 105, Laws of the State of Washington for 1921, do, hereby declare the foregoing quarantine order and rules and regulations set forth in the above-recited order of the Director of Agriculture shall be in full force and effect from and after this date.

Said quarantine order shall be published in one issue of the Tacoma Daily Index, a newspaper of general circulation in the State of Washington, and a copy of the quarantine order shall be transmitted by registered mail to the General Manager of the American Railway Express Company, Seattle, Washington, and to each of the following named railroad companies, to-wit:

Northern Pacific Railway Company, Seattle.
Oregon-Washington Railroad & Navigation Company, Portland, Oregon.
Union Pacific System, Omaha, Nebraska.
Spokane, Portland and Seattle Railway, Portland, Oregon;
Oregon Short Line, Salt Lake City, Utah;
Great Northern Railway Company, Seattle;
Chicago, Milwaukee & St. Paul Railway, Seattle, Washington.

In witness whereof, I have hereunto set my hand and caused the seal of the State of Washington to be affixed at Olympia, this 9th day of April, 1924.

(Signed) Louis F. Hart, Governor.

Attest: J. Grant Hinkle, Secretary of State.

[fol. 163] IN SUPREME COURT OF WASHINGTON

[Title omitted]

WRIT OF ERROR—Filed Jun. 30, 1924

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Supreme Court of the State of Washington and the Judges thereof, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington, before you, which said judgment was rendered on the 2nd day of April, 1924, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between the State of Washington, plaintiff and respondent, and Oregon-Washington Railroad & Navigation Company, a corporation, defendant and appellant, wherein was drawn in question the validity of a statute of, or an authority exercised under, the United States and the decision was against their validity, and there was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution,

treaties or laws of the United States, and the decision or in favor of their validity, and there was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under, the United States and the decision was against the title, right, privilege or immunity specially set up or claimed under such [fol. 164] clause of the said Constitution, treaty, statute or commission, and there being manifest error in the said decision and judgment greatly to the damage of the said Oregon-Washington Railroad & Navigation Company, as by its answer appears, we, being willing that error, if any hath been, should be corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done everything to correct that error, which of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States the 28th day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-four.

F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington. (Seal of the United States District Court, Western District of Washington.)

Allowed by John F. Main, Chief Justice of the Supreme Court of the State of Washington.

[fols. 165 & 166] Citation—In usual form, showing service on John H. Dunbar; filed June 30, 1924; omitted in printing

---

[fol. 167] In Supreme Court of Washington

[Title omitted]

Acceptance of Service of Writ of Error Papers—Filed Jun. 30, 1924

We hereby acknowledge the receipt of copies of the following papers and accept service thereof:

Petition for Writ of Error of the appellant, Oregon-Washington Railroad & Navigation Company.

Order Allowing Writ of Error in the above entitled cause, signed by John F. Main, Chief Justice of the Supreme Court of the State of Washington, and fixing the cost bond in the sum of $1,000.00,

filed in the office of the Clerk of the Supreme Court of the State of Washington on the 28th day of June, 1924.

Assignment of Errors.

Writ of Error issued by the Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

Bond on Writ of Error.

Præcipe for Transcript.

Citation.

Dated this 30th day of June, 1924.

John H. Dunbar, Attorney General of the State of Washington; R. G. Sharpe, Assistant Attorney General of the State of Washington, Attorneys for Respondent.

[fol. 168] IN SUPREME COURT OF WASHINGTON

[Title omitted]

CLERK'S CERTIFICATE

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above, foregoing and attached exhibits constitute a full, true and correct transcript of the record in the above entitled cause, and that in pursuance of the writ of error heretofore filed in this cause, I now transmit the same, together with the original writ of error and the original citation, to the United States Supreme Court, together with the original exhibits detached.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 13th day of August 1924.

C. S. Reinhart, Clerk. (Seal of the Supreme Court, State of Washington.)

Endorsed on cover: File No. 30,653. Washington Supreme Court. Term No. 187. Oregon-Washington Railroad & Navigation Company, plaintiff in error, vs. State of Washington. Filed October 7, 1924. File No. 30,653.

INDEX

Page

Reference to Opinion of Lower Court 1

Statement of Grounds of Jurisdiction 2

Statement of the Case 5-13

Specification of Assigned Errors intended to be urged 13-17

Summary of Argument 17

Argument 18-54

State Statute and Quarantine Order issued thereunder invalid because of Congressional Legislation covering same subject matter 18-41

State Statute and Quarantine Order in violation of Paragraph 3, Section 8, Article I, Constitution of the United States 41-54

INDEX OF CASES AND STATUTES CITED

Page

Act of March 3, 1905 39

Act of August 20, 1912 21

Act of August 11, 1916 41

Act of March 4, 1917 21

Act of February 13, 1925 4

Asbell vs. Kansas, 209 U. S. 251 42

Brimmer vs. Rebman, 138 U. S. 78 49

Chy Lung vs. Freeman, 92 U. S. 275 51

C. R. I. & P. R. Co. vs. Hardwick Farmers Elevator Co., 226 U. S. 426 30

Erie R. R. Co. vs. New York, 233 U. S. 671 30

Farmers Grain Co. vs. Langer, 273 U. S. 635 41

Grain Standards Act 41

Henderson vs. New York, 92 U. S. 259 51

Judicial Code of United States, Section 237 4

Kansas Southern Ry. vs. Kaw Valley District, 233 U. S. 75 43

INDEX OF CASES AND STATUTES CITED—Continued

	Page
Leisy vs. Hardin, 135 U. S. 100	50
Lemke vs. Farmers Grain Co., 258 U. S. 50	41
Mich. P. U. C. vs. Duke, 266 U. S. 570	42
Minnesota vs. Barber, 136 U. S. 313	49
Minnesota Rate Cases, 230 U. S. 352	30
Mo. Pac. R. R. vs. Larabee Mills Co., 211 U. S. 612	26
Mo. Pac. R. R. vs. Stroud, 45 Sup. Ct. Rep. 243	29
Mutual Life Ins. Co. vs. McGrew, 188 U. S. 291, 307	4
N. P. Ry. Co. vs. Washington, 222 U. S. 370	30
O. R. & N. Co. vs. Fairchild, 224 U. S. 510	43
Pierce vs. New Hampshire, 16 U. S. 513 (5 How. 504)	50
Plant Quarantine Act	21
Railroad Co. vs. Husen, 95 U. S. 465	42, 47, 51
Rasmussen vs. Idaho, 181 U. S. 198	52
Sanitary District vs. United States, 266 U. S. 405	30
Schollenberger vs. Pennsylvania, 171 U. S. 1, 12	49
Scott vs. Donald, 165 U. S. 58	49
Shafer vs. Farmers Grain Co., 45 S. Ct. 481	42
Smith vs. Lowe, 121 Fed. 753	43, 53
Smith vs. Railroad Co., 181 U. S. 248	42, 51
Southern Ry. Co. vs. Reid, 222 U. S. 424	28
State vs. C. M. & St. P. Ry. Co., 200 Mo. App. 109	39
33 Stat. L. 1264	39
37 Stat. L. 315, Chapter 308	21
39 Stat. L. 482	41
39 Stat. L. 1165, Chapter 179	21
Washington Laws 1921, Chapter 105	2, 3, 10, 13, 15, 17, 32

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 187

OREGON - WASHINGTON RAILROAD & NAVIGATION COMPANY,
Plaintiff in Error,

vs.

STATE OF WASHINGTON,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Reference to Opinion of Lower Court.

The opinion of the Supreme Court of the State of Washington, which is sought to be reversed by this Writ of Error, was filed in that Court on February 6th, 1924, and is reported in Volume 128 of the official reports of the decisions of the Supreme Court of Washington at Pages 365, et seq.

This opinion is also set forth in full in the printed Transcript of Record herein at pages 74, et seq.

Statement of Grounds of Jurisdiction.

Judgment of the Superior Court of the State of Washington for Thurston County was rendered July 13th, 1923. (R. 15.)

Judgment of the Supreme Court of the State of Washington affirming said judgment of the Superior Court was rendered April 2d, 1924. (R. 91.)

Plaintiff in Error contended in said Superior Court, by demurrer to the Complaint (R. 9), by motion to strike Paragraph III of the Complaint (R. 2, 10, 11), by its Answer to said Complaint (R. 12, 13) and by its challenge to the sufficiency of plaintiff's evidence (R. 60), that the Complaint and the evidence offered in support thereof, were insufficient to entitle the State of Washington to the judgment asked for and rendered herein, because:

(a) The quarantine order of the Director of Agriculture of the State of Washington, set forth in the Complaint, which was the basis of this suit, was in contravention and violation of Section 8, Article I, of the Constitution of the United States, and was an attempted unlawful regulation of interstate commerce.

(b) Chapter 105 of the Laws of 1921 of the State of Washington, under authority of which said quarantine order was issued, is, and each and every section thereof is, in contravention and violation of Section 8, Article I, of the Constitution of the United States.

(c) Said Chapter 105 of the Laws of 1921 of the State of Washington, and said quarantine order are, and each

of them is, in contravention of and in conflict with the Act of Congress of the United States of August 20, 1912, being Chapter 308, Volume 37, of the United States Statutes at Large, Page 318, as amended March 4, 1917, by Chapter 179 of Volume 39 of said Statutes at Large, Page 1165.

(d) That said quarantine order is in contravention and violation of said Chapter 105 of the Laws of 1921 of the State of Washington.

Each and all of these contentions were overruled by said Superior Court (R. 13-14, 19-20, 60), and said judgment in favor of the State of Washington, sustaining such quarantine order, was thereupon entered by said Court. (R. 15.)

Plaintiff in Error thereupon appealed from said judgment of said Superior Court to the said Supreme Court of the State of Washington, and there renewed and urged each of its said contentions and claims for said reasons, which contentions and claims were each overruled by said Supreme Court of the State of Washington by its said opinion in said case (R. 74-90), and final judgment was thereupon entered in said Supreme Court of the State of Washington after a petition for rehearing had been denied, affirming said judgment of said Superior Court. (R. 91.)

By said opinion and judgment said quarantine order and said Chapter 105 of the Laws of 1921 of the State of Washington were held and decided by said Supreme Court of the State of Washington to be valid and not in violation

of the Constitution of the United States, or of the Act of Congress invoked by defendant (Plaintiff in Error).

The jurisdiction of this Court is invoked under the provisions of Section 237 of the Judicial Code of the United States, in effect when the Writ of Error herein was issued, which provided, "A final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity * * * may be reexamined and reversed, or affirmed in the Supreme Court upon a writ of error."

The jurisdiction of this Court to review the judgment of the Supreme Court of the State of Washington, in this case, by writ of error, under this provision of the Judicial Code of the United States, in effect when the Writ of Error herein was issued, is definitely conferred by statute. The same right is given by the Act of Congress of February 13, 1925, amending Section 237 of the Judicial Code, which amendatory act also expressly provides in Section 14 that "it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

Mutual Life Ins. Co. vs. McGrew, 188 U. S. 291-307.

Statement of the Case.

The State of Washington, by its Attorney General, commenced this action in the Superior Court for Thurston County, Washington, seeking an injunction forbidding the Plaintiff in Error (defendant in the action) from transporting, as a common carrier by railroad in interstate commerce, into the State of Washington, (or through said state except in sealed containers) any alfalfa hay from certain territory of neighboring states, in violation of a certain quarantine order, issued and promulgated by the Director of Agriculture of said State, with the alleged approval of the Governor.

After alleging the operation by the defendant corporation (Plaintiff in Error) of lines of railroad in the states of Idaho, Oregon and Washington as a public carrier for hire, the Plaintiff (Defendant in Error) by its Complaint further alleged:

> "II. That at all times since June, 1921, and prior thereto, there has existed and now exists in the areas of the states of Utah, Idaho, Wyoming, Oregon and Nevada, hereinafter set forth, an injurious insect popularly called the alfalfa weevil, and scientifically known as the Phytonomus posticus, which said insect feeds upon the leaves and foliage of the alfalfa plant, as a result of which crops of alfalfa are, where such insects exist in large numbers, greatly damaged or totally destroyed; that said insect multiplies rapidly and is propagated by means of eggs deposited by the

female insect upon the leaves and stalks of the alfalfa plant; that when the alfalfa plant is cured, the eggs cling to and remain dormant upon the cured alfalfa hay and even in the alfalfa meal, when such hay is converted into meal, and such eggs and live weevils are likely to be carried to any point where such alfalfa hay is transported, such eggs there to germinate and the alfalfa weevil there to be distributed and propagated, and that as a result thereof, the curing of alfalfa hay infected with the said alfalfa weevil and the transporting of such hay and the meal made therefrom to localities theretofore free from such weevil, may, and commonly does, result in the infection with said weevil of the alfalfa crops at the points to which such alfalfa hay and meal is transported. That when said alfalfa hay and meal produced from crops of alfalfa infected with alfalfa weevil is transported in common box cars such as are commonly used upon the several railroads in the state of Washington, including defendant, and not placed in sealed containers, said meal and the hay and the dried leaves and foliage therefrom containing said eggs and live weevils is likely to be shaken out and distributed along the route taken by the freight cars in which the same is conveyed and said pest communicated to the agricultural lands adjacent to the said routes as a result of the germination of the eggs of the alfalfa weevil upon the hay falling from such freight cars and the falling out of said live weevils. That a proper inspection to ascertain the presence of such weevil eggs in carloads of alfalfa hay or meal would require that every bale of

hay and sack of meal contained in such carload or consignment be torn open and a careful inspection made of the stalks and leaves of such alfalfa, and such meal, which method of inspection is necessarily prohibitive in cost and wholly impracticable, and that hence the only practical method of preventing the spreading of the said alfalfa weevil pest into uninfested districts is to prohibit the transportation of alfalfa hay or meal from the district in which the said alfalfa weevil exists; that said alfalfa weevil is new to and not generally distributed within the state of Washington. That there is no known method of ridding a district infected with such alfalfa weevil of such pest and that when a district is once infested therewith it always remains thus infested.

"III. That subsequent to June 8, 1921, and prior to September 17, 1921, information was received by the Director of Agriculture of the State of Washington that there was a probability of the introduction of such alfalfa weevil into the State of Washington, and across the boundaries thereof, and the said Director of Agriculture did thereupon proceed thoroughly to investigate said insect and the areas where such pest existed, and from such investigation, did ascertain that such pest existed and was dangerously injurious to alfalfa in the whole of the state of Utah, all portions of the state of Idaho lying south of Idaho County, the counties of Uinta and Lincoln in the state of Wyoming, the county of Delta in the state

of Colorado, the counties of Malheur and Baker in the State of Oregon, and the county of Washoe in the State of Nevada, and that the said Director of Agriculture of the State of Washington did thereupon, on or about September 17, 1921, make and promulgate a quarantine regulation and order under the terms of which the said Director of Agriculture did declare and proclaim a quarantine against all of the above described areas and forbid the importation into the State of Washington of alfalfa hay and alfalfa meal (except under the conditions therein contained)," etc. (R. 1-4.)

A copy of the quarantine order thus made is attached to the Complaint and is set forth on pages 4 to 8, Record. The material parts thereof for consideration here are as follows:

"Whereas, It has become known to me that an injurious insect, popularly called the alfalfa weevil, and scientifically known as 'Phytonomus posticus' exists and is dangerously injurious to alfalfa in the State of Utah, and in many of the counties of the southern part of Idaho, and in certain counties in the State of Wyoming, towit: Uinta and Lincoln; and a certain county in the State of Colorado, to-wit: Delta; and in certain counties in the State of Oregon, to-wit: Malheur and Baker; and in Washoe County, Nevada.

"Now, therefore, I, E. L. French, Director of Agriculture of the State of Washington, under and by virtue of the authority conferred upon me by Chapter 105, Session Laws of 1921, do hereby declare and

proclaim a quarantine against said State of Utah, and all portions of the State of Idaho lying south of Idaho County, and the counties of Uinta and Lincoln in the State of Wyoming; and the county of Delta in the State of Colorado and the counties of Malheur and Baker in the State of Oregon, and the county of Washoe in the State of Nevada, and forbid the importation into Washington of the following agricultural products and other articles, excepting under conditions and regulations as specified.

"1. Alfalfa hay." * * *

The Plaintiff (Defendant in Error) further alleged that during the months of January, February, March and April, 1923, the Defendant (Plaintiff in Error), knowing of the existence of the quarantine order and in disregard and violation of it, shipped in common box cars from various points in Idaho south of Idaho County, and through the state of Oregon and into the state of Washington, approximately one hundred (100) carloads of alfalfa hay.

That large quantities of alfalfa are grown in eastern and central Washington and adjacent to the railroad lines of the Defendant (Plaintiff in Error), over which such shipments of alfalfa hay were shipped and are likely to be shipped in the future unless an injunction is issued as prayed for in the Complaint, and that unless the injunction be granted the districts where alfalfa is grown in Washington are "likely to and will become infested with such alfalfa weevil pest to the great and irreparable damage of

the citizens and residents of the State of Washington engaged in growing and producing alfalfa therein."

The Plaintiff concludes the Complaint with a prayer "for judgment against the defendant *perpetually* restraining and forbidding the defendant * * * from transporting into the State of Washington (or through said state except in sealed containers) any alfalfa hay * * * from the areas covered and described in said quarantine order." (R. 1-4.)

The order made no provision relative to shipment of alfalfa *through* the state, either in "sealed containers" or otherwise; but absolutely excluded all alfalfa originating in any of the territory mentioned, from "importation into Washington," and it provided that, "If any such articles as are hereinbefore listed come into the State of Washington in violation of this quarantine they must be at once destroyed or returned to the shipper at his expense."

The order took effect on September 17, 1921. Chapter 105 of the Laws of 1921 of the State of Washington under which this quarantine order was issued, is set forth in full, so far as material here, in the opinion of the Supreme Court of Washington, and is found on Pages 78-80 of the Record.

After unsuccessfully challenging the Complaint by motion and demurrer (R. 10-9 and 19), the Defendant (Plaintiff in Error) answered the Complaint, denying all the allegations thereof, except the allegations as to its incorporation and that it was a common carrier by railroad in interstate commerce, which allegations were admitted.

The Answer contained affirmative defenses, setting forth the claims of Plaintiff in Error that said quarantine order, and Chapter 105 of the Laws of 1921 of the State of Washington under which the order was made, were each unconstitutional and void, as and for the reasons hereinbefore set forth in the contentions made and claims advanced by Plaintiff in Error.

The case went to trial upon said pleadings, and evidence was offered and received in behalf of each of the parties.

No evidence was offered to show any reasonable compliance with the requirements of Section 3 of the state quarantine law, that the Director of Agriculture "shall proceed to thoroughly investigate" reports of the existence of plant disease and insects, etc.

The undisputed testimony showed that a part of Idaho, 200 miles north and south and 250 miles east and west, which was included in said quarantine order, was entirely free from weevil infection. (Witness Sabin, R. 60-67).

No witness testified that there had ever been a case of the spread of the weevil by transportation of hay over railroad, although the pest had existed in the state of Utah since 1904. (R. 35.)

The most that any witness would say was that there was a "possibility" of the weevil being so spread. (R. 39, 46, 51.)

No evidence was offered to show that Plaintiff in Error had ever attempted to bring any alfalfa *into* the state of Washington, after the issuance of the quarantine

order, the only evidence being that Plaintiff in Error had carried certain shipments of alfalfa from points in the territory covered by the order through the state of Washington, to points in northern Idaho not covered by the order and that such shipments were not in sealed containers. The state court held that such transportation of alfalfa *through* the state "is, under the circumstances, in effect a shipment into the state, within the meaning of the order, and is, therefore, as much a violation of the order as a shipment into the state with the destination of the shipment therein would be." (R. 90.)

It was shown, and is not disputed, that the only means of communication by railroad between the southern portion of Idaho named in the quarantine order and the northern part of Idaho is over the railroad lines of Plaintiff in Error through the state of Washington. (R. 24.)

After the trial, judgment was entered as follows:

> "That the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, and each and all of its agents, officers and employes be, and they and each of them are hereby *perpetually* restrained and enjoined from transporting into the State of Washington (or through the State of Washington except in sealed containers) any alfalfa hay consigned or shipped from any portion of the following described areas: All portions of the State of Utah, all portions of the State of Idaho lying south of Idaho County, the counties of Uinta and Lincoln in the State of Wyoming, the County of Delta in the State of Colorado, the counties of Malheur and Baker in the

State of Oregon, and the County of Washoe in the State of Nevada.

"This decree shall be and remain in full force and effect so long as Quarantine Order No. 4, made and entered by the department of agriculture of the State of Washington, approved by the governor of the State of Washington and filed with the Secretary of State of said State of Washington on or about September 17, 1921, remains in full force and effect, and in the event of said quarantine order being modified or amended, this decree shall thereafter remain in full force and effect in so far as the same is not in conflict with said quarantine order, as so amended or modified." (R. 15.)

This judgment was in all things affirmed by the state Supreme Court. (R. 91.)

Plaintiff in Error duly applied for and secured a writ of error to review and reverse this judgment for the reasons hereinbefore stated, and because of the errors assigned by it.

Specification of Assigned Errors Intended to be Urged.

I.

The Supreme Court of the State of Washington erred in affirming the ruling of the Superior Court in overruling the demurrer to the Complaint, for the reasons and upon the grounds that the Act of the Legislature of the State of Washington, approved March 16th, 1921, Laws of Washington, 1921, page 308, entitled "An Act to pro-

tect forest, agricultural, horticultural, ornamental and floral trees, shrubs and plants, and the products thereof in the State of Washington, from the ravages of disease and insects and animal or weed pests injurious thereto or destructive thereof; to prevent the introduction into this state or the spread within this state of such diseases and insect and animal or weed pests; and providing penalties for violation thereof," and Quarantine Order No. 4 issued and purporting to be issued thereunder by the Director of Agriculture of the State of Washington, and each of them are invalid and in conflict with Section 8, Article I, of the Constitution of the United States, which gives to Congress power to regulate commerce among the several states.

II.

The Supreme Court of the State of Washington erred in holding that Quarantine Order No. 4 issued by the Director of Agriculture of the State of Washington, was valid and not in conflict with and in violation of Section 8, Article I, of the Constitution of the United States, which gives to Congress power to regulate commerce among the several states.

III.

The Supreme Court of the State of Washington erred in not sustaining the claim of the Defendant that the power, authority, and act of the Director of Agriculture of the State of Washington in issuing Quarantine Order No. 4 was in conflict with Section 8, Article I, of the Constitution of the United States, for the reason that such

power, authority and act was an illegal and unwarranted regulation of commerce among the states, and was, therefore, null and void.

IV.

The Supreme Court of the State of Washington erred in the above entitled suit in holding that the Act of the Legislature of the State of Washington approved March 16, 1921, Laws of Washington, 1921, page 308, entitled "An Act to protect forest, agricultural, horticultural, ornamental and floral trees, shrubs and plants, and the products thereof in the State of Washington, from the ravages of diseases and insects and animal or weed pests injurious thereto or destructive thereof; to prevent the introduction into this state or the spread within this state of such diseases and insect and animal or weed pests; and providing penalties for violation thereof," and the authority exercised thereunder by the Director of Agriculture of the State of Washington, as evidenced by the issuance of Quarantine Order No. 4, was valid and not in conflict with the Act of Congress of August 20th, 1912, Chapter 308, Statutes at Large, page 318, entitled "An Act to regulate the importation of nursery stock and other plants and plant products; to enable the Secretary of Agriculture to establish and maintain quarantine districts for plant diseases and insect pests; to permit and regulate the movement of fruits, plants and vegetables therefrom and for other purposes," and especially Section 8 of said act as amended March 4, 1917, Chapter 179, 39 Statutes at Large, page 1165; and the Supreme Court of the State of Washington in such case erred in holding that the Federal Government

had not assumed control of the subject matter of the action, to the exclusion of the State authority with reference thereto.

V.

The Supreme Court of the State of Washington erred in holding that the evidence in said action did not show that said Quarantine Order No. 4 was issued without proper investigation on the part of the Director of Agriculture of the State of Washington.

VI.

The Supreme Court of the State of Washington erred in affirming the judgment or decree of the trial court, and in entering a final judgment and decree for costs and disbursements in favor of the Defendant in Error.

VII.

The Supreme Court of the State of Washington erred in not reversing the judgment or decree of the Superior Court and in not remanding said cause to the trial court with instructions to enter a decree therein dismissing said suit and awarding the Defendant a judgment for its costs and disbursements of the action.

VIII.

The Supreme Court of the State of Washington erred in failing to hold that the Director of Agriculture of the State of Washington was without jurisdiction to issue Quarantine Order No. 4 and in not holding that the Secretary of Agriculture of the United States then had and

now has exclusive jurisdiction under the Constitution and statutes of the United States to act with respect to the matters contained in said Quarantine Order No. 4.

Summary of Argument.

The state statute, Chapter 105, Laws 1921, and the quarantine order issued thereunder, are invalid because Congress has enacted a statute covering the same matter, to which the state statute and quarantine order must yield.

The quarantine order, and the state statute, in so far as it authorizes such order, are in violation of Paragraph 3 of Section 8, Article I, of the Constitution of the United States; that said quarantine order was arbitrarily made, embraces extensive territory free from disease or insect infestation, and extends beyond what is reasonable or necessary for a proper quarantine in the circumstances, if any quarantine was or is justified.

The decree sustained by the Supreme Court of Washington and its order and judgment affirming same were and are erroneous in that they are based upon a law of the State of Washington and a quarantine order made by authority of said law, which law and order are and each of which is repugnant to the Constitution and laws of the United States in the respects asserted in the Errors assigned by the Plaintiff in Error herein.

ARGUMENT.

THE STATE STATUTE, CHAPTER 105, LAWS 1921, WASHINGTON, AND THE QUARANTINE ORDER ISSUED THEREUNDER ARE INVALID BECAUSE CONGRESS HAS ENACTED A LAW COVERING SPECIFICALLY THE SAME SUBJECT MATTER.

The alfalfa weevil is a small oval shaped beetle, native of Southern Europe, Russia and Italy, where it has existed from time immemorial (R. 35-36). It is not a serious pest in Europe because of the presence there of natural enemies, consisting of a certain fly which pervades the alfalfa fields where the weevil is breeding and prevents propagation (R. 36-41). It is claimed that the origin of the weevil in this country dates back to 1904, or prior thereto, when it was discovered in Utah (R. 41).

The record fairly shows that the larvae, hatched from eggs deposited by these beetles upon the alfalfa plant, are more or less destructive of it in this country because of the absence here of the natural enemies that successfully cope with it in Europe. The Department of Agriculture of the United States, however, is attempting to establish these parasites in this country (R. 41).

The spread of the weevil in this country has been admittedly slow (R. 39). Whether there is any danger of such spread by the transportation of baled alfalfa hay in railroad box cars is at least open to serious doubt, and an affirmative finding would certainly not be warranted upon the record in this case.

On the contrary, the United States Department of Agriculture seemingly considers that such spread by railroad has not happened, for by its Bulletin No. 741 (R. 47, 59) circulated by one George R. Reaves, detailed by this department of the Government to Utah to study the weevil (R. 48), it said: "No connection can be traced between the railroads and the actual spread of the alfalfa weevil, in fact the advance of the weevil has been rather slower along certain railroads than in some regions remote from them."

According to the year book of the Department of Agriculture published in 1923, it appears that the acreage of alfalfa in the United States has practically doubled every ten years since 1899, and that in the year 1919 more than eight and a half million acres, distributed largely throughout the states west of the Mississippi River, were devoted to the production of this crop; and yet, according to the record in this case, the existence of the weevil in the largest producing areas is not even claimed, except for an isolated county in Colorado, one in Nevada, two in Oregon, two in Wyoming, a part of southern Idaho and the state of Utah.

There has been no showing, nor indeed is there any contention by the Defendant in Error that the widely spread producing areas indicated upon the map of the Department of Agriculture (published on page 345 of its 1923 Year Book) as alfalfa producing are infected at all, except to the limited extent above stated.

In this situation and under these circumstances and conditions, and on the 17th day of September, 1921, the

Defendant in Error, by its Director of Agriculture, issued and caused to be made effective its quarantine order forbidding the importation of alfalfa hay from all portions of the state of Idaho lying south of Idaho County *into* the state of Washington. The state law, by virtue of which the quarantine order in question was made follows this brief as Appendix "A."

In the spring of 1923 the defendant railroad company, having received in due course as a common carrier certain carloads of alfalfa originating in Idaho south of Idaho County, which shipments were accompanied with appropriate certificates of inspection issued by the Department of Agriculture of the state of Idaho and which were en route to destinations in northern Idaho, proceeded to transport the same by railroad *through* the states of Oregon and Washington to their Idaho destinations (R. 23, 24). Two of the cars were confiscated by officers of the Horticultural Department of the State of Washington (R. 34); and thereafter, and on the 14th day of May, 1923, the Defendant in Error, as plaintiff, by its Complaint filed in the Superior Court of the state, sought "judgment against the defendant *perpetually* restraining and forbidding the defendant * * * from transporting into the State of Washington (or through said state except in sealed containers) any alfalfa hay from the areas covered and described in said quarantine order."

By appropriate pleadings this Defendant (Plaintiff in Error) challenged and here challenges the authority of the State in the premises, in that the subject matter involved was within the exclusive jurisdiction of the Federal

Government by virtue of an Act of Congress approved August 20, 1912 (Vol. 37, Stat. L., page 315, Chapter 308), entitled, "An act to regulate the importation of nursery stock and other plants and plant products; to enable the Secretary of Agriculture to establish and maintain quarantine districts for plant diseases and insect pests; to permit and regulate the movement of fruits, plants, and vegetables therefrom, and for other purposes," as amended by Act of Congress approved March 4, 1917 (39 Stat. L., page 1165). Section 8 of the statute thus invoked reads, as amended, as follows:

"Sec. 8. That the Secretary of Agriculture is authorized and directed to quarantine any State, Territory, or District of the United States, or any portion thereof, when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and throughout the United States; and the Secretary of Agriculture is directed to give notice of the establishment of such quarantine to common carriers doing business in or through such quarantined area, and shall publish in such newspapers in the quarantined area as he shall select notice of the establishment of quarantine. That no person shall ship or offer for shipment to any common carrier, nor shall any common carrier receive for transportation or transport, nor shall any person carry or transport from any quarantined State or Territory or District of the United States, or from any quarantined portion there-

of, into or through any other State or Territory or District, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine except as hereinafter provided. That it shall be unlawful to move, or allow to be moved, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from any quarantined State or Territory or District of the United States or quarantined portion thereof, into or through any other State or Territory or District, in manner or method or under conditions other than those prescribed by the Secretary of Agriculture. That it shall be the duty of the Secretary of Agriculture, when the public interests will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, and method and manner of delivery and shipment of the class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carry-

ing any dangerous plant disease or insect infestation, specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from a quarantined State or Territory or District of the United States, or quarantined portion thereof, into or through any other State or Territory or District; and the Secretary of Agriculture shall give notice of such rules and regulations as hereinbefore provided in this section for the notice of the establishment of quarantine: Provided, That before the Secretary of Agriculture shall promulgate his determination that it is necessary to quarantine any State, Territory, or District of the United States, or portion thereof, under the authority given in this section, he shall, after due notice to interested parties, give a public hearing under such rules and regulations as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney."

The authority of Congress to regulate commercial intercourse between the states with respect to this or any other commodity is, of course, admitted. The court below also concedes that "this law * * * was enacted by Congress looking to the regulation of interstate commerce in so far as horticultural and agricultural products therein mentioned are concerned." (R. 86.) "The products therein mentioned," in so far as this case is concerned, are "any class of plants * * * capable of carrying any dangerous plant disease or insect infestation." The agricultural products mentioned in the state law upon which

the quarantine order involved in this case is based are "plants * * * and the products thereof."

The declared purpose of the Federal act is "* * * to enable the Secretary of Agriculture to establish and maintain quarantine districts for plant diseases and insect pests; to permit and regulate the movement of * * * plants * * * therefrom and for other purposes." The purpose of the state law is declared to be "to protect * * * agricultural * * * plants and the products thereof * * * from the ravages of diseases and insects * * * injurious thereto or destructive thereof; to prevent the introduction into this state * * * of such diseases and insect * * * pests."

The subject matter and declared purpose of the two laws are substantially the same. The methods prescribed to accomplish the declared purposes, however, differ materially, and it is proper to recognize the possibility of the influence of trade jealousy in the administration of the state act and the entire improbability of any such influence in the administration of the national act.

As above indicated, the Secretary of Agriculture has been making the alfalfa weevil the subject of study and investigation and has been taking steps to combat the spread of this insect, and indeed maintains a representative with headquarters in Utah "to study the weevil." (R. 48.)

The record failing to show, however, the promulgation of any quarantine order by this department of the Federal government directly against alfalfa hay, the court below sustains the jurisdiction of the state authorities, with comment of justification as follows: "We are not ad-

vised of any quarantine regulation ever having been made or promulgated with reference to alfalfa hay or alfalfa weevil by the Secretary of Agriculture of which we may take judicial notice. Nor are we advised by proof of any such regulation." (R. 86.)

The Secretary of Agriculture is *directed* by the Federal act to quarantine "when he shall determine that such quarantine is necessary." It follows that, in the absence of quarantine, the Secretary has determined the same to be unnecessary. In the face of such determination of absence of necessity by the confessedly sovereign power, the Supreme Court of the State of Washington determines that an administrative officer of that state, entertaining a contrary view and conclusion, may not only summarily stop the movement of the commodity at the Washington state line as it is proceeding in transit along the only available common carrier route to its destination in northern Idaho, but that he can enter the cars in which it is being transported and remove and confiscate the property. By the terms of the Washington law and the quarantine order complained of comity between states is laid to one side and the certificate of the constituted officers of Idaho is disregarded. Indeed, if accompanied with a favorable certificate of inspection issued by the Secretary of Agriculture of the United States, a shipment can not be made without violating the Washington quarantine order and the state court's injunction.

The state court bases its conclusion in respect of the point under consideration upon its application to the present case of a general statement of the doctrine of Federal

occupation of the field made in the course of the opinion of this Court in Missouri Pacific Railway vs. Larabee Mills, 211 U. S. 612.

In that case a state court, in the exercise of its general jurisdiction, had mandamused the Missouri Pacific to resume for the benefit of the Larabee Mills a switching service consisting of the movement of cars over a section of its own line between a spur track serving the mill and a transfer track serving the Santa Fe Railway, a service which it had long previously performed for the mill and which it was continuing to perform for other industries in the same locality.

The Missouri Pacific first questioned its duty to perform the service in the absence of the declaration of any such duty by act of the legislature or mandate of a commission or other administrative board. This Court held that the service had been undertaken as a common carrier service, and that it was a common law obligation of the carrier to treat all shippers alike, and that such obligation could be enforced by mandamus.

The Missouri Pacific further contended that as about three-fifths of the flour shipped by the mill was transported to points outside the state, the switching service constituted interstate commerce, and that by the creation of the Interstate Commerce Commission, with a large measure of control over interstate commerce, Congress had withdrawn from the power of the state any control over the operation in question. With reference to that contention, this Court stated the principle that the power of Congress to regulate interstate commerce, and equally its delegation

of that power to a commission, does not interfere with the power of the state as to matters incidentally affecting interstate commerce, but that *"until specific action by Congress or the commission the control of the state over these incidental matters remains undisturbed."*

It is this statement of the general principle which the state court regards as determinative of the present case; but this Court did not, as we understand it, state such general proposition, even as determinative of the Larabee Mills case. Upon the further contention that the switching operation there in question was not a mere incidental matter indirectly affecting interstate commerce, this Court said that the question presented was the power of the state to prevent discrimination between shippers, and the final conclusion of this Court was that the common law duty of carriers to treat shippers with equality in such a case might, at least in the absence of congressional action, be compelled by the state.

The point so actually decided in that case has no possible application to the present case. Certainly, upon its facts, the Larabee Mills case is not even remotely a precedent for this case. But in any event, we think the state court misapprehended the language used by this Court in its discussion of the doctrine of Federal occupation of the field. There was in that case no specific action by Congress on the particular subject matter. The Missouri Pacific invoked merely the Interstate Commerce Act in general, and, while that Act embodied specific action upon many phases of interstate commerce which has either before or since been held to have effected a complete occupa-

tion of those subjects, there was no suggestion that it contained any specific action upon the particular subject of switching services.

We understand the principle to be that while full power to regulate interstate commerce resides in Congress, neither the mere existence of such power nor a mere delegation to a commission of such latent power excludes the state control over matters incidentally and indirectly affecting interstate commerce; but that when Congress exercises its theretofore latent power and assumes jurisdiction over a given subject of interstate commerce by taking specific action thereon, either in the form of direct enactment of a mandate or prohibition or in the form of charging a commission or other agency with the active administration of the subject, the state power is wholly excluded.

This Court in the case of Southern Railway Co. vs. Reid, 222 U. S. 424, has construed the Larabee Mills case as sustaining this doctrine. The Southern Railway case involved a shipment tendered to the railroad company for transportation in interstate commerce. No rate having been published to cover the solicited transportation service, the railroad company declined to accept it. The statute of North Carolina imposed a penalty upon a carrier who refused to accept and transport, over the route designated by the shipper, goods so tendered to it. It was held that, notwithstanding the fact that no rate had been fixed as required by law for this particular transportation, still Congress, by the creation of the Interstate Commerce Commission and the delegation to it of certain powers had

so evidenced its intention of occupying the field of rate making that the statute in controversy was void and unconstitutional. In discussing its opinion in the Larabee case this Court said:

> "The principle of that case, therefore, requires us to find specific action either by Congress in the Interstate Commerce Act, or by the Commission, covering the matters which the statute of North Carolina attempts to regulate. There is no contention that the Commission has acted, so we must look to the Act. Does it, as contended by plaintiff in error, take control of the subject-matter and impose affirmative duties upon the carriers which the state can not even supplement? In other words, has Congress taken possession of the field? * * * There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of."

The construction placed upon this decision in the Larabee Mills case by the state Supreme Court in this case is in positive conflict with an unbroken line of decisions rendered in recent years by this Court to the effect that when Congress has asserted its paramount control over subjects of interstate commerce, there is no police power reserved in the state to invade it.

> Missouri Pacific Ry. Co. vs. Stroud, 45 Sup. Ct. Rep. 243. (Decided March 2, 1925.)

Minnesota Rate Cases, 230 U. S. 352-406.

Sanitary District vs. United States, 266 U. S. 405-426.

Erie Railroad vs. New York, 233 U. S. 671-681.

Chicago Rock Island R. R. vs. Hardwick Elevator Co., 226 U. S. 426-435.

Northern Pacific Ry. Co. vs. Washington, 222 U. S. 370-378.

From the Chicago Rock Island Railway case we quote, page 435, as follows:

> "the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subjects, the state may exert authority until Congress acts, under the assumption that Congress by inaction, has tacitly authorized it to do so; action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the state impotent to deal with a subject over which it had no inherent but only permissive power";

and from the Northern Pacific Railway case, page 378, as follows:

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence

of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the State."

That Congress has occupied the field of the importation of plants into the United States and of transportation of same between the states cannot be questioned. The first seven sections of the Federal act referred to cover importation of nursery stock and other classes of plants, etc., or other plant products from any country or locality. It would be unthinkable that once imported, inspected and marked as required by this law and by such appropriate rules and regulations as the Secretary of Agriculture may have made with respect thereto, a state could enforce a prohibition against the transportation of same into or through its boundaries by a common carrier. Section 8 of the Federal act as amended is fully as broad and all-embracing with respect to the quarantine of plants and plant products afflicted with disease or insect infestation and with respect to the transportation of such plants or plant products by common carriers from any state or district therein quarantined by him into or through any other state.

The Federal act, however, safeguards against summary action by the Secretary when the public interest will

permit and contemplates not only inspection and certification, whereby products free from disease may move, but provides for notice to the public and for a hearing at which interested parties may appear and be heard. The Federal act provides also for a board of five members "for the purpose of carrying out the provisions of this Act." Appropriations have been made by Congress from year to year for the purpose of carrying out this Plant Quarantine Act.

Turning now to Chapter 105 of the Laws of 1921 of the state of Washington (Appendix "A"), under which the quarantine order in question was issued, we think it clearly appears that this law was intended to cover the identical field covered by the Federal act, so far as the State of Washington is concerned.

Section 2 of this law authorizes the state Director of Agriculture, and makes it his duty to establish, maintain and enforce obligatory quarantine regulations deemed necessary to protect agricultural products, etc., "against contagion or infestation by injurious plant disease insects, or animal or weed pests, by establishing such quarantine at the boundaries of this state."

The Director is authorized to make rules and regulations deemed necessary to prevent such infected or infested products "from passing over any quarantine line established and proclaimed pursuant to this Act." It provides for inspection of such products by state officers only, and prohibits any such product passing over such quarantine line, "except upon a certificate of inspection," signed by such *state* officer. This section covers both importa-

tions from foreign countries and shipments from other states.

Section 3 provides for an investigation by the Director before establishing any such quarantine, but does not provide for any public or other hearing as is provided in the Federal act.

Section 4 of this law provides that:

> "Each carload, case, box, package, crate, bale or bundle of trees, shrubs, plants, vines, cutting, grafts, scions, buds, fruit-pits, or fruit or vegetables or seed, imported or brought into this state, shall have plainly and legibily marked thereon in a conspicuous manner and place the name and address of the shipper, owner or owners or person forwarding or shipping the same, and also the name of the person, firm, or corporation to whom the same is forwarded or shipped, or his or its responsible agents, also the name of the country, state or territory where the contents were grown, and a statement of the contents therein."

Section 5 requires that the shipment of any infected or infested products through the state must be "within sealed containers, composed of metallic or other material, so that the same cannot be broken or opened," and that such containers shall not be opened within the state.

Section 6 provides for notice to the Director of the arrival in the state of any shipment from a territory quarantined against and for an inspection by the state officials of such products.

It is clear that these two laws are intended to cover the same subject matter. The only difference is that the state law is intended to prevent plant disease, insect pests, etc., coming into the state of Washington from other states or countries, or spreading within the state, while the Federal law is intended to accomplish the same thing as to all the states.

The two laws are so inconsistent that both cannot be enforced, with reference to the state of Washington, at the same time. The Secretary of Agriculture of the United States could determine that no necessity existed for a quarantine against alfalfa grown in all or any part of the territory covered by the state quarantine order, and the Director of Agriculture of the state determine that such necessity did exist.

If alfalfa grown in such territory were inspected, disinfected, certified and delivered to a railroad properly marked as provided by the Federal act, for shipment through the state of Washington, such carrier would be bound to accept and carry the same, or be liable for its failure to do so, but transportation of such products through the state of Washington, in violation of its quarantine order, would expose the carrier to punishment for violation of the state law.

The state court says, in substance, that because the record presented to it in this case fails to show any quarantine regulation by the Secretary of Agriculture of which it can take judicial notice, and because of the absence of proof of any such regulation, the Federal act has never taken effect so as to supersede the state law.

While, as hereinbefore indicated, the record affirmatively shows that the alfalfa weevil has been made the subject of study by the Department of Agriculture, that action by the Department has and is being taken to combat it, and that the Department has a local representative in the territory involved in the state quarantine order, yet, as stated by the court below, the record does not show that the Secretary of Agriculture has quarantined the shipment of alfalfa from any district because of the presence of the weevil therein, *neither does it show that he has not taken such action.*

The presumption is, in the absence of evidence to the contrary, that public officers perform the duties imposed upon them by law. If the Secretary of Agriculture investigated conditions in the territory quarantined against but determined that no quarantine was necessary, he would take no action and make no official record whatever; and it would be difficult, if not impossible, to prove that fact. Nevertheless, the failure or refusal of the Secretary to take affirmative action in such case would as effectually prevent state action, as his affirmative action would do. Otherwise, there would arise the confusion and conflict intended to be avoided by Congress.

In the case at bar Congress had power to prevent the spread of infectious plant diseases and insect pests among the states, and to provide quarantines and quarantine regulations for that purpose. It passed a law for the purpose of exercising this power. It "authorized and directed" the Secretary of Agriculture to establish such quarantines and regulations "when he shall determine that such quarantine

is necessary." It made it "the duty of the Secretary of Agriculture" to promulgate rules and regulations governing "the inspection, disinfection, certification, and method and manner of delivery *and shipment*" of agricultural products, etc., "capable of carrying any dangerous plant disease or insect infestation" from one state into another.

Can it be said that Congress intended to leave it to the Secretary of Agriculture to say whether or not he would take any action whatever under this law, as well as whether or not he would establish any quarantine if he did take any action? Did Congress intend to leave it to the discretion of the Secretary of Agriculture whether or not this law should occupy this field, and be effective for the purpose for which it was enacted? Did Congress intend to leave it to the discretion of the Secretary of Agriculture to say when and where and to what extent this law should be effective as against state legislation?

Did not Congress intend to make it the duty of the Secretary to make such investigation whenever, from information received from a state or otherwise, it appeared that such quarantine or regulations might be necessary to prevent the spread of such disease or insects into another state; and, having made such investigation, if he determined that such quarantine was necessary, to establish the same, and that this entire matter should be left to the Secretary for decision, to the exclusion of any state action thereon?

It seems to us too clear for argument that the obvious intent of Congress by this Act, was to remove the question of quarantines against imports of such products, and in-

terstate quarantines thereof, entirely from the scope of state legislation.

The several states would not have the means of investigating conditions in other states that the Federal government has; they could not as well determine the necessity for quarantines against products from other states; state legislation would more likely be hasty, without necessity, unduly burdensome and might even be used to discriminate against products of other states. In fact, all the evils that caused Congress to exercise its right to regulate interstate carriers inhere in permitting each state to make its own quarantine regulations relative to interstate shipments of farm products. Congress, therefore, by this Plant Quarantine Act took possession of this entire field, gave full authority to the Secretary of Agriculture to do all that might be necessary to protect all parts of the country from plant infection through interstate shipments; and not only *permitted* the Secretary to exercise such authority but *required* him to do so, instead, as the state contends in this case, of permitting the Secretary to leave such powers as Congress gave him to be exercised by the various states when he wished to do so.

Any other construction of the effect of the Federal act would lead to interminable confusion. No one would know when the Federal act and when the state act applied. Shippers and carriers would be required in every case where the state officers asserted jurisdiction, to inquire if the Federal officers had acted, and, if so, whether and to what extent the state was deprived of jurisdiction.

When the Federal officers investigated and decided that no quarantine was necessary, no action would be taken by them and probably no record made, nevertheless their decision not to act would be as effective as their affirmative action. But how could shippers or carriers know whether or not they had made such investigation and decision? If a conflict arose between the action of the Federal and state officers because the former decided to act after the state officers had done so, how would shippers and carriers know which they were to obey, and to what extent?

If the Federal officers removed a quarantine they had established because they decided it was no longer necessary, would such removal leave the field open for the state officers? Or would any action by the Federal officers forever occupy that field to the exclusion of state jurisdiction? If so, what would be the extent of the "field" so occupied? Would it be bounded by the area of the territory quarantined against, or the products included, or the regulations imposed, or all combined?

Such a condition of uncertainty would lead to disputes, lawsuits, destruction of or damage to interstate traffic in lawful commodities of commerce, and an unsettling of business that could not justify any such division of authority. The alternative, which we believe Congress intended to and has adopted, is for it to assume jurisdiction of the entire matter, leaving the several states to seek such protection against the spread of such plant disease and insect pests, as they can secure through action by the Secretary of Agriculture of the United States, rather than to their own laws and quarantines. Of course, we are not con-

cerned with any action taken by the state within its own borders.

We think this contention is sound in principle and sustained by decisions of this Court above cited, as well as by decisions of other courts.

These questions were all carefully considered and answered as we have contended, by the Missouri Court of Appeals in the case of State vs C. M. & St. P. R. Co., 200 Mo. App. 109; 206 S. W. 419. The Federal statute there under consideration was the act of March 3, 1905, 33 Stat. L. 1264, relating to quarantining against diseased cattle. One question decided was whether this act supplanted the state quarantine law prior to action by the Secretary of Agriculture. The court said:

> "But it is insisted by the state that until the Secretary of Agriculture acts under the authority given him by Congress, and declares quarantine against the state of Iowa, the superior authority of Congress could not be considered to have been asserted, and hence the state had authority to declare quarantine against cattle in Iowa, and prescribe rules and regulations against bringing cattle into this state from that state.
>
> "We think that is a mistaken view of what Congress did and intended. When Congress, by the act above referred to, 'directed' the Secretary of Agriculture to declare quarantine against any state or part of a state whenever, on investigation, he believed the cattle in such state or part thereof was affected with any contagious disease, and required him to prescribe

rules and regulations in all interstate shipments for the transportation of cattle, it assumed control of the subject.

"By such statute Congress affirmatively and exclusively occupied the field of quarantine as it related to interstate shipments of cattle. It directed the Secretary of Agriculture to ascertain when quarantine was necessary and we must assume that, when that official had not quarantined any particular section or district of country, no cause of quarantine existed, and hence any declaration of quarantine by state officers under the state statute was usurping the authority of Congress, and was a void act as it related to an interstate shipment. The state concedes, as of course it must, that if Congress had acted in regard to quarantine and interstate shipments it would have superseded the state law; but the error into which the state has fallen is in assuming that Congress has not acted. Congress asserted its authority by putting the matter of quarantine exclusively in the hands of the Secretary of Agriculture, the effect of which was to take such matter out of the hands of state officials acting under a superseded state law. If, as insisted time and again by the state, no federal law was in force until the event of the Secretary of Agriculture declaring quarantine, what would be said of a situation where the Secretary did not consider there was cause for quarantine, and therefore took no action, and the state thought there was? What sort of medley would this opposite action and clash of authority present?"

The Circuit Court of Appeals of the Eighth Circuit in the case of Farmer's Grain Co. vs. Langer, 273 Fed. 635, decided that the North Dakota state grain grade law was in conflict with the United States Grain Standards Act (Act of August 11, 1916, 39 St. L. 482) and therefore void.

This Court affirmed this decision on another ground, but did not pass on this question because unnecessary.

Lemke vs. Farmer's Grain Co., 258 U. S. 50.

It seems to us that the facts of this case bring it squarely within the settled rule of law announced in the cases cited, and, therefore, the state law and the quarantine order based thereon must fall. If that is correct, of course the judgment of the state court has no legal foundation and must be reversed.

The State Law and the Quarantine Order in Question Are in Violation of Paragraph 3 of Section 8, Article I, of the Constitution of the United States.

If the Court determines that the state law and the quarantine order issued thereunder are not in conflict with the Federal law, we contend nevertheless that the law and the order are void, because they not only unduly and directly interfere with and burden interstate commerce but prohibit such commerce, for the order, as sustained by the decree of the state court, effectively prevents for all time the movement of alfalfa hay in interstate commerce from Southern Idaho into or through the state of Washington.

In arriving at a conclusion with respect to this proposition, we should give due consideration to the following legal principles established, we believe, by the decisions of this court:

First: That a state law, or regulation or order pursuant thereto, which in its operation of necessity directly interferes with or burdens interstate commerce, is invalid.

Railroad Co. vs. Husen, 95 U. S. 465.
Shafer vs. Farmer's Grain Co., 45 Sup. Ct. Rep. 481. (Decided May 4, 1925).

Second: That in the exercise of its police power by a law, or by order or regulation pursuant thereto, the state can not obstruct foreign or interstate commerce beyond what is necessary to control or correct the condition or situation against which the legislation or order is directed.

Railroad Co. vs. Husen, 95 U. S. 465.
Smith vs. Railroad Co., 181 U. S. 248-255-258.
Asbell vs. Kansas, 209 U. S. 251-256.
Michigan Public Utilities vs. Duke, 266 U. S. 570.

Third: While in a case of this character the state may, in the first instance, enjoy the presumption that the requirements of the statute were complied with by the state officer who made the order, yet, when the order was challenged by the pleadings in the case, the court was bound to accept and consider evidence with respect to the pertinent inquiries as to whether due investigation was made by the state, and as to whether the conditions and circumstances obtaining at the time the order was made, justified

such order. Evidence on this subject having been received, the court was bound to give it judicial consideration and erred in declining to do so.

Kansas Southern Ry. vs. Kaw Valley District, 233 U. S. 75-79.

O. R. & N. Co. vs. Fairchild, 224 U. S. 510-531-532.

Smith vs. Lowe, 121 Fed. 753.

That the state authorities have grievously exceeded legitimate police power in the making and enforcement of the order complained of will be appreciated from a very brief review of the record. As previously shown, there is a conflict of opinion whether there is any substantial danger of the spreading of the weevil by moving hay in railroad box cars in midwinter or spring following its cutting. As pointed out before, the representative of the Department of Agriculture in this district does not recognize danger of spread by such railroad transportation.

The state's witness Kincaid (R. 35), gives the only direct testimony to sustain the state's contention when he says there is great danger in the transfer of the hay from one section to another (R. 38). Whether he means from carrying newly cut, loose hay in an exposed way from one section to another, or whether he had in mind transportation in box cars of hay long since cured is not disclosed. On cross examination (R. 39) he testifies:

"Q. What is the effect of carriage through an uninfected district in box cars?

"A. There is a possibility of hay containing weevil, etc. There is a possibility of some of the material from the bundles of hay being spilled out, that is the weevils themselves * * * could get out through cracks and doors, etc."

The state's witness O'Gara (R. 46) thinks there would be *"a possibility particularly in the shipment of the first crop."* Later he admits he has no knowledge on the subject from either observation or experience.

The state's witness Jones (R. 48-51) testifies that the weevil eggs are laid in the spring; and to the question, *"Don't you know, as a matter of fact, within fourteen days the eggs are not fertile, they are either hatched or else they are no good?"* answered: *"That is probably the rule, but not what we would expect * * * so far as I know that is true, yes."* The witness further states in substance that he has never heard of the spread of the weevil by the shipping of hay.

On behalf of the defendant, the witness Silas L. Smith, after qualifying as an expert, testifies (R. 69):

"Q. Do you know, Mr. Smith, of your own observation of any spread of the alfalfa weevil from shipping hay?

"A. No, I do not.

"Q. From your investigation of the alfalfa weevil, Mr. Smith, do you think it possible or probable, probable or possible to spread or to start colonies of

alfalfa weevils, from shipping alfalfa hay through the State of Washington or any other territory that is not infected?

"A. Decidedly improbable."

It is recognized that the weevil is not regarded as a menace in the alfalfa producing fields in Europe. That the weevil has existed in Utah for the last twenty years and has not, as yet, been transmitted to the state of Washington is also established. In these circumstances the state law of Washington was passed in March, 1921, authorizing quarantine by summary order but requiring a *thorough investigation* by its designated officer before taking such action.

Not only is there an absence of investigation on the part of such officer, but by the state's witness Robinson (R. 53-58) he, as supervisor of the division of Horticulture in the Washington State Department of Agriculture on September 17, 1921, made, without any investigation, what the state contends to be a perpetual quarantine order against the movement of alfalfa hay into or through the state of Washington from several districts in the United States. All of the quarantined areas except southern Idaho were and are so remote from the state of Washington that the transportation of hay therefrom into or through Washington was and is inconceivable. Notwithstanding its bulky character and light loading, however, it appears that hay was moving to some extent from southern Idaho through Washington to northern Idaho.

Whereupon the witness finds a quarantine order of 1919 in the office of his department, and, without making

any independent investigation, draws the order in controversy here from one that was effective two years prior to this legislative act of 1921.

The trial court expresses the opinion that this evidence "tending to controvert the facts found by the Director of Agriculture and embodied in the quarantine order made by him was * * * improperly admitted and cannot be considered by the court." (R. 13). The Supreme Court in effect affirms this conclusion.

The complaint prays for a perpetual injunction and the decree grants it, with the qualification that the injunction shall be modified as and when the state officer modifies his quarantine order. That no intention to modify the quarantine order is contemplated is disclosed by the testimony of the state's witnesses when they say (R. 40) "it would be impracticable to set any limit". (R. 50). "Once the weevil always the weevil, is that it? A. Yes."

The area quarantined in Idaho embraces a vast territory of some five counties, some 200 miles by 250 miles in area, which is entirely free from weevil or plant disease (R. 63-64 and 67).

No inspection, certification or other action by the authorities of Idaho or by the Secretary of Agriculture of the United States heretofore or hereafter made or taken will relieve the plaintiff in error from this quarantine order and judgment. The officers of the state of Washington alone can give relief.

The court below attempts to justify the action complained of and the order made by stating that this law,

this order and the action of the state officers under it are but a lawful exercise by the state of its police power.

In challenging this decision we invoke the opinion of this Court in Railroad Company vs. Husen, 95 U. S., wherein the Court states at page 469:

> "It seems hardly necessary to argue at length that unless the statute can be justified as a legitimate exercise of the police power of the state, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of Interstate Commerce, a regulation extending to prohibition. Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other and in both cases is necessarily exclusive. That the transportation of property from one state to another is a branch of interstate commerce is undeniable.
>
> "The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest power—that of destruction. It meets at the borders of a state a large and common subject of commerce and prohibits its crossing the state line during two-thirds of each year. * * * The statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not

> bring into the state any Texas cattle or any Mexican cattle or Indian cattle between March first and December first in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not, and if you do bring them in even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' Such a statute we do not doubt is beyond the power of a state to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."

The court concludes:

> "The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise. And under color of it, objects not within the scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

There is no suggestion of emergency requiring the summary action that was taken. The record discloses a vigilant and experienced agricultural board in Idaho, and that within that state the authorities who inspected and certified this hay for transportation had and were maintaining quarantine in certain producing localities in their own state. Their concern to prevent the spread of the insect in Idaho was as great as that of the authorities of

the state of Washington to prevent its being transmitted into the latter state. The haul through the state of Idaho of the hay in question was approximately as great as was involved in that part of the journey from the Washington line to the northern Idaho line.

It will be contended, however, by the state that the necessities of the case require such a drastic order and that provisions for inspection, so as to allow the hay that is not infected to be admitted to the state, are impracticable, on account of the prohibitive cost and great labor involved in an inspection of hay. We do not understand the law to be that the necessities of the case furnish the criterion, or that the fact that inspection may be burdensome justifies the total exclusion of a lawful article of commerce. In Schollenberger vs. Pennsylvania, 171 U. S. 1, 12, it is stated:

> "The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. The state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported but such police power does not include the total exclusion even of an article of food."

After referring to the cases of Minnesota v. Barber, 136 U. S. 313; Brimmer vs. Rebman, 138 U. S. 78, and Scott vs. Donald, 165 U. S. 58, 97, which cases held that

where inspection regulations were of such a character or were burdened with such conditions as would wholly prevent the introduction of sound articles from other states, such regulations were an unlawful exercise of the police power, the court asks:

> "Is the rule altered in a case where the inspection or analysis of the article to be imported is somewhat difficult and burdensome? Can the pure and healthy food product be totally excluded on that account? No case has gone to that extent in this court. The nearest approach to it was the case of Pierce vs. New Hampshire, 16 U. S. 513 (5 How. 504), involving the importation of intoxicating liquors. But in Leisy vs. Hardin, 135 U. S. 100, the New Hampshire case was overruled, and it was stated by the present Chief Justice in speaking for the court that 'Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or whatever are thus recognized can be controlled by state laws, amounting to regulations while they retain that character.'
>
> "To concede to a state the power to exclude directly or indirectly articles so situated, without Congressional permission, is to concede to a majority of the people of a state represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to

be exercised by the people of the United States represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create."

The court says that the absolute prohibition of an unadulterated, healthy and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure.

The case of Smith vs. Railroad Company, 181 U. S. 248, cited by the state court, is one which prohibited cattle to be transported from the state of Louisiana into the state of Texas between June 5, 1897, and November 15, 1897. There was no provision for inspection but a total exclusion of the cattle during the period named, and it was held under the facts of that case that such exclusion was a lawful regulation of interstate commerce under the police power of the state. Mr. Justice Harlan (with whom Mr. Justice White concurred) and Mr. Justice Brown wrote strong dissenting opinions. While apparently approving the cases of Henderson vs. New York, 92 U. S. 259; Chy Lung vs. Freeman, 92 U. S. 275; Railroad Company vs. Husen, 95 U. S. 465, and other cases holding the same doctrine, the court says:

"The exclusion in the case at bar is not as complete as in the cited cases. That, however, makes no difference if it is within their principle, and their principle does not depend upon the number of states

which are embraced in the exclusion. It depends upon whether the police power of the state has been exerted beyond its province—exerted to regulate interstate commerce—exerted to exclude without discrimination the good and the bad, the healthy and the diseased, and to an *extent beyond what is necessary for any proper quarantine.* * * * The words in italics express an important qualification. The prevention of disease is the essence of a quarantine law."

We do not understand the holding of the Court to be that the necessities of the case furnish the sole measure of the constitutionality of a statute or quarantine order, but that it is of equal importance to consider whether or not the statute or order is a regulation of interstate commerce. The limits of the police power of a state have never been definitely defined, but whatever those limits may be, the state may not go beyond what is necessary for a proper quarantine. In other words, if the state, under some circumstances, might be permitted to exclude cattle from a quarantined area for six months during the year, still if proper inspection laws would accomplish the same purpose as a total exclusion, the state would not be warranted in going beyond reasonable inspection laws. If the necessities of the case should be held to be the sole criterion, and the state be permitted to determine the necessity, it would be equivalent to holding that the police power of the state is paramount to the Constitution of the United States.

In Rasmussen vs. Idaho, 181 U. S. 198, also cited by the state court, the constitutionality of a quarantine order

prohibiting the introduction of sheep into the state from a quarantined area for a period of sixty days was upheld. The court differentiates the facts in this case and says as to the Husen case:

> "It will be perceived that the act was an absolute prohibition operative during eight months of each year; it was an act continuous in its force; provided for no inspection; and was predicated on the assumption that the state had the right to exclude for two-thirds of each year the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not."

The following language used in the case of Smith vs. Lowe, 121 Fed. 753, seems to us very pertinent to the facts here:

> "Can state officers accomplish under the protection of a valid law the very results which the state is forbidden to authorize by legislation? Here are state officers, who, if the allegations of the bill are true, are so using the police power as to obstruct interstate commerce beyond the extent of its exercise. The contention of the appellees followed to its logical conclusion is that, if the act under which the state officers proceed to establish a quarantine is of itself valid and constitutional, it matters not to what extent such authority be abused, nor upon what grounds or information the officers proceed. No matter how arbitrary they act, nor how unfounded in necessity or reason, it must be presumed that it is done in good faith and the bona fides thereof is not subject to investigation.

By this doctrine, the power of Congress to regulate interstate and foreign commerce is practically taken away and vested in the executive officer of the state."

CONCLUSION.

We respectfully submit that, for the reasons herein stated, and under the authorities cited, the judgment of the state court should be reversed and the action dismissed.

HENRY W. CLARK,
F. T. MERRITT,
ARTHUR C. SPENCER,
Attorneys for Plaintiff in Error.

APPENDIX "A"

CHAPTER 105—SESSION LAWS OF WASHINGTON 1921
PROTECTION OF TREES, SHRUBS AND PLANTS.

An Act to protect forest, agricultural, horticultural, ornamental and floral trees, shrubs and plants, and the products thereof in the state of Washington, from the ravages of diseases and insects and animal or weed pests injurious thereto or destructive thereof; to prevent the introduction into this state or the spread within this state of such diseases and insect and animal or weed pests; and providing penalties for violation thereof.

Be It Enacted by the Legislature of the State of Washington:

Section 1. The forest, agricultural, horticultural, ornamental and floral trees, shrubs, and plants in the state of Washington, and the products thereof shall be preserved and protected from the ravages of diseases, insects, and animal and weed pests injurious thereto and destructive thereof.

Section 2. The Director of Agriculture shall have the power and it shall be his duty by and with the approval of the Governor to establish and the director shall thereupon maintain and enforce such obligatory quarantine regulations as may be deemed necessary to protect the forest, agricultural, horticultural, ornamental and floral trees, shrubs and plants, and the products thereof in the state of Washington, against contagion or infestation by injurious plant disease insects, or animal or weed pests, by establishing such quarantine at the boundaries of this state or elsewhere within the state, and he may make and enforce, any and all such obligatory rules and regulations as may be deemed necessary to prevent any infected or infested forest, agricultural, horticultural, ornamental and floral trees, shrubs, and plants, and the products thereof in the state of Washington from passing over any quarantine line established and proclaimed pursuant to this act, and all such

articles shall, during the maintenance of such quarantine, be inspected by such director or by horticultural or other inspectors thereto appointed, and he and the inspectors so conducting such inspection shall not permit any such article to pass over such quarantine line during such quarantine, except upon a certificate of inspection, signed by such director or in his name by such inspector who has made such inspection. All approvals by the governor given or made pursuant to this act shall be in writing and signed by the governor in duplicate, and one copy thereof shall be filed in the office of the secretary of state and the other in the office of said director before such approval shall take effect.

Section 3. Upon information received by such director of the existence of any infectious plant disease, insect or other animal or weed pest, new to or not generally distributed within this state, dangerous to any plant or commodity or to the interests of the plant industry of this state, or that there is a probability of the introduction of any such infectious plant disease, insect or other animal or weed pests into this state or across the boundaries thereof, he shall proceed to thoroughly investigate same and may establish, maintain and enforce quarantine as hereinbefore provided, and may make and enforce such regulations as are in his opinion, necessary to circumscribe and exterminate such infectious plant diseases, insect or other animal or weed pests and prevent the spread thereof. Such director may disinfect, or take such other action with reference to any trees, shrubs, plants, vines, cuttings, grafts, scions, buds, fruit-pits, fruit, seeds, vegetables or any crops or crop products, and any containers thereof, and any packing material used therewith infested or infected with, or which, in his opinion, may have been exposed to infection or infestation by, any such infectious plant diseases, insect or other animal or weed pests, as in his discretion shall seem necessary to carry out and give effect to the provisions of this act. Such director, his deputies and inspectors are hereby authorized to enter upon any ground or premises to inspect the same or to inspect any tree,

shrub, plant, vine, cutting, graft, scion, bud, fruit-pit, fruit, seed, vegetable or other article of horticulture or implement thereof or box or package or packing material pertaining thereto, or connected therewith or that has been used in packing, shipping or handling the same, and to open any such package, and generally to do, with the least injury possible under the conditions to property or business all acts and things necessary to carry out the provisions of this act. The said director shall at once notify the Governor of all quarantine lines established under or pursuant to this act, and if the Governor approve or shall have approved the same or any portion thereof, the same shall be in effect and the Governor may issue his proclamation proclaiming the boundaries of such quarantine and the nature thereof, and the order, rules or regulations prescribed for the maintenance and enforcement of the same, and may publish said proclamation in such manner as he may deem expedient to give proper notice thereof.

All orders, rules and regulations issued by the director of agriculture pursuant to this act shall have the force and effect of law.

Sec. 4. Each carload, case, box, package, crate, bale or bundle of trees, shrubs, plants, vines, cutting, grafts, scions, buds, fruit-pits, or fruit or vegetables or seed, imported or brought into this state, shall have plainly and legibly marked thereon in a conspicuous manner and place the name and address of the shipper, owner or owners or person forwarding or shipping the same, and also the name of the person, firm, or corporation to whom the same is forwarded or shipped, or his or its responsible agents, also the name of the country, state or territory where the contents were grown, and a statement of the contents therein.

Sec. 5. When any shipment of nursery stock, trees, vines, plants, shrubs, cuttings, grafts, scions, fruit, fruit-pits, vegetables or seed, or any other horticultural or agricultural product passing through any portion of the State of Washington in transit, is infested or infected with any species of injurious insects, their eggs, larvae, pupae or

animal or plant disease, which would cause damage, or be liable to cause damage to the forests, orchards, vineyards, gardens, or farms of the State of Washington, or which would be, or liable to be, detrimental thereto or to any portion of said state, or to any of the forests, orchards, vineyards, gardens or farms within said state, and there exists danger of dissemination of such insects or disease while such shipment is in transit in the State of Washington, then such shipment shall be placed within sealed containers, composed of metallic or other material, so that the same can not be broken or opened, or be liable to be broken, or opened, so as to permit any of the said shipment, insects, their eggs, larvae, or pupae or animal or plant disease to escape from such sealed containers and the said containers shall not be opened while within the State of Washington.

Sec. 6. Whenever the director of agriculture declares, promulgates and issues quarantine measures, orders or regulations against any part or portion of this state or any other state or county or section thereof, for the protection of any forest, agricultural, horticultural, ornamental or floral trees, shrubs or plants, and there shall be received in this state, any forest, agricultural, horticultural, ornamental or floral trees, shrubs, or plants, or the raw products thereof, from any part or portion of this state or any other state or country or section thereof, against which the quarantine has been issued as to such commodity, it shall be the duty of the person, or the official of the carrier having such shipment in charge for delivery, unless the same is accompanied by a certificate of inspection and approval by a horticultural inspector of this state, showing that the same was inspected and approved at the initial point of shipment, to notify the horticultural inspector stationed nearest to the point where said shipment is received, of the receipt of such shipment giving the name of the consignor and consignee and stating that such shipment is ready for inspection and delivery. Said notification shall be either by telephone or telegraph, and confirmed by written notice delivered personally to said inspector or to some person of suitable age and discretion at his residence or office, or by

mail addressed to said inspector at his place of residence or at his office; and it shall be unlawful for any such agent or person having such shipment in charge to deliver the same to the consignee or to any other person until the same shall have been inspected by a horticultural inspector; Provided, however, That such agent shall not be required to hold such shipment more than forty-eight hours after notifying the inspector as aforesaid, except in case the notice is given by mail, in which event, such shipment shall be held for such period beyond said forty-eight hours as is ordinarily required for delivery of mail to the address of the inspector. Upon the delivery to the consignee of a shipment accompanied by a certificate of inspection as aforesaid, the agent or person making the delivery shall retain the certificate of inspection showing his authority for releasing the same.

Sec. 7. Every person who shall violate or fail to comply with any rule or regulation adopted and promulgated by the director of agriculture in accordance with and under the provisions of this act shall be guilty of a misdemeanor, and for a second and each subsequent violation or failure to comply with the same rule or regulation, shall be punished by imprisonment in the county jail for not less than thirty days or more than one year, or by a fine of not less than $100.00, or more than $1,000.00, or by both such fine and imprisonment.

Sec. 8. This act shall not be construed as repealing or limiting any of the provisions of existing laws touching on any of the matters herein referred to, but shall be deemed to be supplemental thereto.

Passed the House, March 2, 1921.

Passed the Senate, March 7, 1921.

Approved by the Governor, March 16, 1921.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1925

No. 187

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,
Plaintiff in Error,

vs.

STATE OF WASHINGTON,
Defendant in Error.

Upon Writ of Error to the Supreme Court of the State of Washington.

BRIEF OF DEFENDANT IN ERROR

JOHN H. DUNBAR,

R. G. SHARPE,

Attorneys for Defendant in Error.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

JAY THOMAS, PUBLIC PRINTER, OLYMPIA.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1925

No. 187

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,
Plaintiff in Error,

vs.

STATE OF WASHINGTON,
Defendant in Error.

Upon Writ of Error to the Supreme Court of the State of Washington.

BRIEF OF DEFENDANT IN ERROR

JOHN H. DUNBAR,

R. G. SHARPE,

Attorneys for Defendant in Error.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

INDEX

	Page
Reference to Opinion of Lower Court	5
Statement of Grounds of Jurisdiction	5
Statement of the Case	6
Summary of Argument	8
Argument	9-39
Quarantine order not unreasonable, nor does it embrace territory free from alfalfa weevil	9-22
Quarantine order not an unwarranted regulation of interstate commerce, contrary to Sec. 8, Art. I, of Federal Constitution	22-32
State law and quarantine order not invalid as an invasion of a field already occupied by federal legislation	32-39

INDEX OF CASES AND STATUTES CITED

	Page
Act of August 20, 1912	32
Asbell v. Kansas, 209 U. S. 251	38
Atlantic Coast Line R. Co. v. Commonwealth, 136 Va. 134, 118 S. E. 257	35
Carey v. South Dakota, 250 U. S. 118	37
Compagnie Francaise De Navigation A Vapeur v. Board of Health, 186 U. S. 380	31
Missouri Pac. Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 612	33, 38
Railroad Co. v. Husen, 95 U. S. 465	22
Railway Co. v. Harris, 234 U. S. 412	34
Rasmussen v. Idaho, 181 U. S. 198	25
Reid v. Colorado, 187 U. S. 137	37-38
Schollenberger v. Commonwealth, 171 U. S. 1	31
Smith v. Lowe, 121 Fed. 753	20
Smith v. Ry. Co., 181 U. S. 248	7, 19, 20, 27
State v. R. Co., 200 Mo. App. 109, 206 S. W. 419	38
State v. Rasmussen, 7 Ida. 1	26
37 Stat. L. 318	32
Savage v. Jones, 225 U. S. 501	36-37
U. S. Compiled Stat. Secs. 8752-8764	32
U. S. Compiled Stat. Sec. 8760	32, 36
U. S. Constitution, § 8, Art. I	8
Washington Laws 1921, Chap. 105, Sec. 5	6, 39

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1925

No. 187

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,

Plaintiff in Error,

vs.

STATE OF WASHINGTON,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

REFERENCE TO OPINION OF LOWER COURT.

The opinion of the supreme court of the State of Washington, in entering the judgment sought to be reversed by the writ of error herein, was filed in that court on February 6, 1924, and is reported as *State of Washington v. Oregon-Washington Railroad & Navigation Company*, 128 Washington 365-392.

STATEMENT OF GROUNDS OF JURISDICTION.

Plaintiff in error has set forth in its brief a fair statement of the grounds upon which the jurisdiction of this court is invoked.

STATEMENT OF THE CASE.

Plaintiff in error has, in the main, fairly stated the facts. We desire, however, to add a word of explanation with respect to certain portions of such statement.

On page 10 of its brief, plaintiff in error says:

"The order made no provision relative to shipment of alfalfa *through* the state, either in 'sealed containers' or otherwise."

It is true that the quarantine order does not contain this provision, but we do find it in the statute upon which such order is based; namely, Laws of Washington for 1921, chapter 105, section 5 (copied in full on pages 57-58, brief of plaintiff in error) which provides:

"When any shipment of nursery stock, * * * or any other horticultural or agricultural product passing through any portion of the State of Washington in transit, is infested or infected with any species of injurious insects, their eggs, larvae, pupae or animal or plant disease, * * * then such shipment shall be placed within sealed containers, composed of metallic or other material * * * and shall not be opened while within the State of Washington."

The promulgation of the quarantine order was premised on the theory that alfalfa hay originating in the banned districts was presumptively infested or infected with the alfalfa weevil, their eggs, larvae, etc. That being true, the railroad company was forbidden, not by the quarantine order, but by the statute itself from shipping such hay through the state otherwise than in sealed containers. Clearly it was not necessary to embody the law in the quarantine order. The railroad company and its employees were conclusively presumed to know the law.

On page 11 of the brief of plaintiff in error it is asserted that:

"No evidence was offered to show any reasonable compliance with the requirements of section 3 of the state quarantine law, that the Director of Agriculture 'shall proceed to thoroughly investigate' reports of the existence of plant disease and insects, etc."

But these facts were established by legal presumptions which established the facts in the absence of evidence to the contrary.

Smith v. Ry. Co., 181 U. S. 248, 258.

Again, on page 11 it is asserted that "the undisputed testimony showed that a part of Idaho, 200 miles north and south and 250 miles east and west, which was included in said quarantine order, was entirely free from weevil infection."

This so-called "undisputed testimony" was that of but one witness, Harry Sabin, state horticultural inspector of Idaho, (R. 60) who testified that in 1921 and 1922 he spent 30 days in the spring and 15 days in July going along the highways in this area making sweepings with a net. (R. 63.) This constituted a total area of 50,000 square miles covered in 45 days, or 1,111 square miles per day! And yet counsel insists that Mr. Sabin's conclusions that there were no weevils in this territory conclusively establish that as a fact.

Again, on page 11 it is stated that no witness testified that there had ever been a case of the spread of the weevil by the transportation of hay over railroads. The evidence in this connection will be reviewed later.

SUMMARY OF ARGUMENT.

The quarantine order complained of is neither arbitrary nor unreasonable, nor does it embrace territory free from the alfalfa weevil.

The quarantine order does not amount to an unwarranted regulation of commerce among the states, contrary to section 8, Article I, of the Federal Constitution.

Neither Chapter 105, Laws of Washington for 1921, nor the quarantine order promulgated thereunder, are invalid because of federal legislation covering the same field.

ARGUMENT.

The Quarantine Order Is Not Unreasonable, Nor Does It Embrace Territory Free From the Alfalfa Weevil.

The constitutionality of the order complained of necessarily involves a somewhat extended review of the facts revealed by the evidence. In so doing, for convenience, plaintiff in error will be referred to as "the railroad" and defendant in error as "the state."

Dr. Trevor Kincaid, Head of the Department of Zoology, of the University of Washington, and connected with that University since 1894 (R. 35), testified that the alfalfa weevil originally came from Europe and was introduced into Utah in 1904; that in 1909 he was sent to Europe by the government and while there made an investigation of the alfalfa weevil in its natural habitat, South Europe, Russia and Italy, (R. 35) where it had existed from time immemorial; that he found that there the weevil is not a serious pest for the reason that there its natural enemies exist and keep it down,—that as soon as it multiplies in any section its natural enemies get under way and quickly demolish it; that efforts to introduce its natural enemies in this country have been only partly successful for the reason that it takes a long time to get that natural check under way, and that so far as he knew in this country its natural enemies have not multiplied sufficiently to be an offset.

The alfalfa weevil is a small beetle about 3/16th of an inch long, oval in shape. A little beak projects down in front of the head like a snout, which is injected into the

tissue of the plant and its food taken in that way. The alfalfa is destroyed through the operations of thousands of these little beetles that eat away the leaves and stems. The insect is brown in color, hairy on the upper surface, somewhat mottled in appearance. Plaintiff's exhibit "A" shows the full-grown beetle, the cocoons in which the pupa secretes itself when changing from larva to pupa, and a stem of infected alfalfa. (R. 36.) During the winter time the beetles are the only stage in existence except there are a certain number of the eggs that are in the stalks during the winter. The beetles, when the alfalfa is shooting up in the spring, wake up from a somewhat torpid condition in which they spend the winter, and lay eggs on the young stalks of the alfalfa and in so doing, bore little holes into the rising stalks in which cavities the eggs are layed, from three to a dozen little green eggs, perhaps 1/64th of an inch in diameter, and oval in form. These eggs hatch out into the larvae or little worm-like animals, with sort of padlike furs that they use for the purpose of clinging to the leaves. These larvae bore from the stem of the plant and into the opening leave pits and gradually destroy them in that way, and as the plant grows they spread widely over the leaves and gradually eat them up. (R. 37.)

The larvae undergo three successive changes or epochs after they hatch out from the egg until they are completely pupated. After hatching, they increase in size and are greenish in color with a white band down the center. Each larva then spins a little cocoon in which the pupa is formed, the second stage. In this they remain several weeks and emerge as a beetle (the third stage),

which continues the ravages of the larvae, although most of the damage is done by the larvae. The beetles emerging into the fields, scatter widely at certain periods when they have certain migratory periods and at the cutting of the alfalfa they are present in vast numbers in the hay and other debris of the alfalfa fields and unfortunately get into the hay at the time of cutting. They remain in the fields until fall, when they become dormant, and lay eggs in the fall which are also more or less dormant. Many of these eggs are detached from the stalks, or are hidden in the cavities in the stalks. These eggs are laid in the late summer or fall, early fall, and will remain until the next spring, when the weather becomes sufficiently warm, and hatch out at the same time the beetles emerge from their seclusion. (R. 37.)

Dr. Kincaid further testified that a great many methods of combatting this pest had been tried without any proven success, such as poison sprays, burning the stubble, dragging brush over the infected fields, starvation by pasturing, etc. That there is no practical way of eliminating them completely from infected areas. If a field once becomes infected so far as present methods are concerned, it will remain infected indefinitely. (R. 38.)

The alfalfa weevil is carried from one district to another in many ways, but the greatest danger is through the transfer of hay from one section to another because the hay will contain either (R. 38) the weevils themselves in more or less dormant condition, or the stalks of hay may contain the eggs, so that infection may be carried even if no weevils are apparent. If hay is carried from

an infected district in box cars to or through an uninfected district there is a possibility of some of the infected hay being spilled out, or the weevils themselves creeping out from the bundles of hay through small cracks, and if there is any alfalfa on the right-of-way they will attack it. (R. 39.)

The weevil normally spreads from the infected center at the rate of about ten miles a year. It started at Salt Lake City and spread in all directions in Utah, and into Idaho. The state of Washington is not yet infested. (R. 39.)

The only practical method of quarantine for protecting an uninfected district from the pest is the total exclusion of hay from an infested district until some method is designed for disposing of the weevil through natural enemies or discovery of some other effective control. It would be impossible to inspect a bale of hay and say it was free from the weevil by superficial examination. A bale might contain internally thousands of weevils and possibly hundreds of thousands of eggs without showing any sign on the outside, and the only way to inspect it would be to unbale the hay and set a man at work with a magnifying glass to examine every bit of stalk to see if there were any fertile eggs. It would take a month to examine a single bale. (R. 40.)

It would be impracticable to set any time limit for the operation of a reasonable quarantine order. To attempt to set a time when the weevil will cease to be a pest would be to require second-sight. (R. 40.)

P. J. O'Gara, a doctor of science from the University of Nebraska, and who had direct experience with the

weevil in connection with farms operated by him in Utah since 1914, upon which alfalfa was the principal crop (R. 44), testified that he did not believe it possible to eradicate the weevil from a district once infested. That it was his experience that all methods of eradication had failed. (R. 45.) There would always be a possibility of carrying the pest from infected to uninfected districts as a result of shipping alfalfa hay baled in infested districts in box cars through uninfected alfalfa districts. It would be impossible to attempt to inspect a carload of baled hay for the purpose of determining whether or not the hay was infected with live weevils or weevil eggs. It would be like trying to find a needle in a haystack. (R. 46.)

The testimony of Wyatt W. Jones, who had a Master's degree in biology and zoology in the University of California, and who had been in charge of two farms in Utah near Salt Lake City, since 1914 upon which farms alfalfa was grown, was to the same effect. (R. 48-50.) That there is no possibility of eradicating the weevil from a district once infected—"once the weevil, always the weevil." (R. 50.) That an inspection of a carload of alfalfa hay for the purpose of ascertaining the presence of live weevils, their larvae or eggs would be "out of the range of practicability entirely." (R. 50.)

From the testimony of F. H. Gloyd, Chief Assistant Director of the Department of Agriculture of the state of Washington, it was shown that approximately 300,000 acres of alfalfa is grown in the state of Washington, principally in the Yakima valley and irrigated portions of Walla Walla, from which approximately a million tons of alfalfa hay was produced annually of the value of about

twelve million dollars. That the Oregon-Washington and Northern Pacific railroads run through the alfalfa district of the state, the Oregon-Washington running through the Walla Walla district, in which there is considerable alfalfa. The alfalfa weevil does not now exist in the state. (R. 25-26.)

S. J. H. French, special rate and traffic agent to the defendant at Portland, testified that plaintiff's exhibit "E" was a statement of certain shipments made over the defendant's railroad from points in Idaho to various other points. This exhibit shows the shipment of a large number of cars of alfalfa hay from various points included in the quarantined district of Idaho to points in northern Idaho, during the first four months of the year 1923. The meaning of the various notations on this exhibit is shown by the testimony of Mr. French. All the shipments consisted of alfalfa hay except where otherwise noted on the exhibit. All of these shipments originated on the Oregon Short Line in Idaho, south of Idaho county, to Huntington, Oregon, and thence over the line of the defendant through some portion of Washington. To some of these shipments there were certificates of inspection attached, but none of these were issued by the Washington, but all by the Idaho state authorities. (R. 21-24.)

No attempt was made by the railroad to meet the evidence introduced by the state save only as to (1) the liklihood of starting colonies of alfalfa weevils from shipping alfalfa hay through uninfested territory; and (2) the existence of the weevil in five counties of Idaho included in Quarantine Order No. 4.

Does the evidence support a finding that uninfested alfalfa fields adjoining a railroad right-of-way are likely to be infested with the weevil as a result of alfalfa hay being hauled from infested districts over such right-of-way in ordinary box cars? We submit that it does.

At the time of the trial there was an annual production in the state of Washington of at least a million tons of alfalfa hay, valued at $12,000,000. (R. 25-26.) The lines of the plaintiff in error run through this alfalfa district. (R. 25.)

Dr. Kincaid of the University of Washington (R. 35), when asked as to the effect of hauling infected hay through an uninfected district in box cars, testified:

"There is a possibility of hay containing weevils on the stalks or eggs attached to the stalks. There would be possibility of some of the material from the bundles of hay being spilled out, that is, the weevils themselves, from the bundles of hay, would creep out through some very small crack, being one-sixteenth of an inch in diameter they could get through a very small space, and could get out through cracks in doors and creep out on the ground, and if there is any alfalfa on the right-of-way they would attack it." (R. 39.)

Later, when asked what, in his opinion, was the only practical method of keeping the weevil out of an uninfected district, Dr. Kincaid replied:

"The only practical solution is total exclusion of the hay for such time until some method is designed for disposing of the weevil through natural enemies or the discovery of some other effective way of control." (R. 40.)

But the court hardly required the assistance of expert witnesses in determining from the admitted facts that there is grave danger of spreading the pest by carrying infected hay in box cars through areas still free of

the weevil. Silas L. Smith, agriculturist for the Union Pacific system, (R. 67) testified on behalf of the railroad that the weevil always finds its way to the bottom of the stack. (R. 71.) This would mean, of course, that in a box car loaded with baled hay, the weevil would find its way to the floor of the car, especially when disturbed by the motion of the train. Such cars are not designed to prevent insects but one-sixteenth of an inch long, from falling, or creeping out on the right-of-way. We all know that this would inevitably happen, particularly in view of the long stops frequently made by freight trains.

As tending to refute this contention of the state, counsel for the railroad called Silas L. Smith, its agriculturist for thirteen years (R. 67), and who had made some investigation of the weevil by reading bulletins and other literature, and interviewing farmers (R. 68). On being questioned as to whether, from his investigation, he thought it possible or probable to start colonies of alfalfa weevils "from shipping alfalfa hay through the state of Washington or any other territory that is not infected," Mr. Smith answered: "decidedly improbable." (R. 69.)

It will be observed, however, that Mr. Smith was not specifically asked as to the probable effect of shipping infected hay through uninfected territory in ordinary box cars; and further, that even he, the railroad's own employee, did not deny the possibility of such infestation.

It is also significant that a similar question was not propounded by opposing counsel to his expert witness, Mr. Harry Sabin, State Horticultural Inspector of Idaho. (R. 60-61.)

Again, counsel for the railroad insists that great force should be given certain isolated statements claimed to be contained in Farmers' Bulletin No. 741, issued by the United States Department of Agriculture (R. 47) to the effect that no connection can be traced between the railroads and the spread of the alfalfa weevil.

It is sufficient to say that this bulletin was not even offered in evidence by counsel for the railroad although counsel purported to read a brief excerpt from it to one of the state's witnesses. (R. 47.) When a corrected copy of the entire bulletin was actually offered in evidence by the state it was rejected as hearsay. (R. 59-60.)

We are at a loss to understand how this document can now be seriously claimed to have any probative value.

Nor can it be claimed that an inspection law would be effective for the very good reason that inspection would be wholly impracticable. It would require a month to examine one bale and declare it free from the weevil! (R. 40.) On this point Mr. O'Gara, who was eminently qualified as an expert on the subject (R. 44-45) testified:

"Every bale opened up and you would have a tremendous time to be taken to do it. It would be very difficult to do it, I think. I think I can give you an instance. In 1914 I made a drive to California to attend a certain meeting at Davis at the Agricultural station. I selected some specimens of alfalfa because I wanted to demonstrate a certain other trouble which was a bacterial blight; I thought I had eliminated the specimens from the weevil, but I found when I reached California some very pretty little cocoons so if the hay were baled and sent to California they might be shipped through." (R. 46-47.)

With respect to the railroad's contention that a portion of Idaho included within Quarantine Order No. 4 was

not in fact infested with the alfalfa weevil, opposing counsel called but one witness, Mr. Sabin, state horticultural inspector of Idaho, with respect to the prevalence of the weevil in Adams, Valley, Boise, Ellinor and Lemhigh counties, Idaho, which are included in Quarantine Order No. 4 but not within the quarantined area fixed by the state of Idaho. This area is shown on the map, showing the respective quarantine lines fixed by Washington and Idaho, defendants exhibit "1." (R. 61.)

Mr. Sabin testified that he spent approximately 30 days in April and 15 days in July in each of the years 1921 and 1922 investigating the weevil in these five counties by taking sweepings, that is, working an insect net backward and forward through the grass in order to get the larvae to drip into the insect net, in the alfalfa fields along the highways. The area supposed to have been covered was 250 miles north and south. (R. 61-2.) Its other dimensions are shown by the map. The portions of the state shown in red are held by the state authorities of Idaho to be infested. (R. 64-5.) And under the Idaho quarantine order, shipments of alfalfa hay are not permitted from this territory into other counties. (R. 66.)

On cross-examination, Mr. Sabin testified:

"Q. Do you mean to say that you know, that you have gone over, alfalfa fields in this whole area, 200 miles north and south, and 250 miles east and west, in that thirty days in July—

"A. I do not mean to say that I was in every alfalfa field, no." (R. 67.)

It is idle, we submit, to urge that anything but the most superficial investigation could have been made by this witness of such a vast area in the short period named.

It is not claimed that his sweepings were made elsewhere than along the highways. (R. 62-3.)

The court must presume that the Washington authorities performed the duties imposed upon them in making the investigation preliminary to the promulgation of the quarantine order in question.

In the case of *Smith v. Ry. Co.*, 181 U. S. 248, 258, it was urged that a sufficient investigation had not been made by the state authorities preliminary to fixing the limits of a quarantine directed against cattle of another state, but the court said:

"It is urged that it does not appear that the action of the Live Stock Sanitary Commission was taken on sufficient information. It does not appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. The plaintiff in error relies entirely on abstract right, which he seems to think cannot depend upon any circumstances or be affected by them. This is a radical mistake. It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality. In some cases the circumstance would have to be shown to sustain the quarantine, as was said in *Kimmish v. Ball, supra.* But the presumptions of the law are proof, and such presumptions exist in the pending case arising from the provisions of and the duties enjoined by the statute and sanction the action of the sanitary commission and the governor of the state."

We cannot believe that the unsupported testimony of one witness who claims to have made, in the course of 45 days, an investigation as to the existence of a tiny insect in a district 200 miles by 250 miles in area, comprising some 50,000 square miles, and admitting that his tests were confined to fields bordering on highways, and that he did not examine every field of alfalfa, can be held suf-

ficient in a collateral proceeding, to upset the finding of the Director of Agriculture that the district in question was in fact infested with the pest so as to require the fixing of the quarantine lines in question. To cover this vast area in 45 days means, as we have already shown, that he must have covered 1,111 square miles a day, which, of course, would be physically impossible. It must be also remembered that Mr. Sabin, as an official of the State of Idaho, was an interested witness, for it must be assumed that it is to the interests of that state to export as much of her agricultural products as possible. The lower court refused to permit the state to show that other states had fixed quarantine lines coincident with those fixed by Quarantine Order No. 4. It does appear, however, that states other than Washington have quarantined against this same disputed area.

It must also be borne in mind that the railroad did not file its answer until the morning of the trial, so that it could hardly be expected that the state would be in a position to produce testimony to meet that of Mr. Sabin as to conditions existing in the State of Idaho, when, as shown by *Smith v. Ry. Co., supra*, it had a right to rely upon the presumption that the state officers, in the promulgation of the quarantine order, had done their duty and made a thorough investigation of the facts.

Counsel cites the case of *Smith v. Lowe*, 121 Fed. 753, in support of its right to challenge the reasonableness of the order. In that case, certain interested sheep owners of the State of Utah had brought an action against the appropriate officials of the State of Idaho to restrain the enforcement of a sheep quarantine order as to their sheep,

alleging that their sheep were free from disease, and there was no infectious disease on their range, and that the reasons recited in the proclamation for the prohibition were false and were based on statements of those who wished to have a monopoly of the grazing on the public lands within the state. The court held that if these facts were true, they would afford grounds for relief.

But it must be remembered that that was a direct proceeding brought by interested parties to restrain the enforcement of the offending quarantine order. Indeed, it could hardly be questioned but that the reasonableness of such a quarantine order could be questioned in a direct proceeding of that kind. If, for instance, the alfalfa growers of the district in question had brought a direct proceeding against the Director of Agriculture of this state to test the reasonableness and propriety of this quarantine order, it would have been proper for the court to inquire into the question of the existence or non-existence of the pest in that district, and upon the character of the investigation made by the Director of Agriculture, but we submit that this cannot be made an issue in a collateral proceeding to compel the observance of the quarantine by a carrier who is but incidentally interested.

The quarantine order was directed against the whole of the State of Utah, two counties in Wyoming, one county in Colorado, one county in Nevada, two counties in Oregon, and all of Idaho south of Idaho County. The railroad does not even claim that the same was unjustified except as to a comparatively small part of the quarantined portion of Idaho, and attempts to support such claim by the testimony of but one interested witness. We

respectfully submit that the unsupported testimony of this witness did not justify the trial court in finding that the quarantine order was promulgated without a sufficient investigation by those state officers expressly charged with the protection of the agricultural and horticultural industries of this state from invasion by insects and other pests and diseases.

The state court, we submit, correctly held that the quarantine order was not unwarranted by the conditions found to exist.

THE QUARANTINE ORDER IS NOT AN UNWARRANTED REGULATION OF INTERSTATE COMMERCE, CONTRARY TO SECTION 8, ARTICLE I, OF THE FEDERAL CONSTITUTION.

The railroad, while conceding that the several states, in the exercise of their police power, may adopt reasonable quarantine regulations for the protection of their animal and plant industries from disease and insect pests, insists that the quarantine order in question cannot be thus justified since it amounts to an absolute embargo upon alfalfa hay coming from the named districts.

The state contends, on the contrary, that the reasonableness of a quarantine regulation must in all cases be determined by the exigencies of the particular problem confronting the commonwealth, and that the quarantine order here involved is no more drastic than the evidence shows the situation demanded.

In support of its contention that the quarantine order is void as an absolute embargo upon the banned products, counsel for the railroad cites the early case of *Railroad Company v. Husen*, 95 U. S. 465. There

it appeared that the Legislature of Missouri in 1872 passed an act providing that no Texas, Mexican, or Indian cattle should be driven or brought into the State of Missouri between March 1st and November 1st of each year, unless such cattle had been kept the entire preceding winter in the State of Missouri, but the act was declared not to apply to cattle passing through the state in railroad cars or steamboats without being unloaded, except that such transportation company should be held responsible for all damages which might result from Spanish or Texas fever along the line of such transportation, and the existence of such disease along the route would be *prima facie* evidence that such disease had been communicated by such transportation. Under this act, Husen brought an action against the railroad company for damages alleged to have resulted to him by reason of the company's violation of this act. The railroad company defended on the ground that the act was a violation of the commerce clause of the constitution. In upholding this contention this court held the offending act unconstitutional for the reason that it purported to be neither a quarantine measure nor an inspection law, but constituted an absolute embargo against certain kinds of cattle entering the State of Missouri during certain portions of the year. This court, however, conceded that the commerce clause of the Federal Constitution did not prevent the several states, under their reserved police power, from enacting reasonable quarantine laws. Thus:

"While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under con-

tagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or inter-state commerce.

* * * * * * * * * *

"Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and Dec. 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."

We submit that there is a marked distinction between the statute considered in the *Husen* case and the quarantine order under consideration here. The Missouri statute constituted an absolute embargo upon all Texan, Mexican, or Indian cattle from whatever point they came during certain portions of the year, unless they had wintered within the state of Missouri. The law in question did not constitute a quarantine against such cattle coming from the states of Texas, Missouri, or any other territory, but was absolutely unlimited in its scope. Moreover, it is plain that there was no particular charm in the fact of the cattle having wintered in the state of Missouri. Had they wintered in any other state of the

same or higher latitude, it is apparent that the climatic effect upon the disease to be guarded against would have been the same. It did not appear, at least from the body of the act, that a quarantine such as was embodied in the act was necessary for the preservation of the cattle of the state of Missouri. In other words, it did not purport on its face to be a quarantine measure, nor was the law an inspection measure.

Again—we submit that the record in this case shows a vast difference between the possibility and the practicability of inspecting baled hay as against tiny beetles, their larvæ and eggs, and the inspection of cattle for the purpose of determining the existence of Spanish or Texas fever. It cannot be doubted but that it would have been practicable for the officials of the state of Missouri to have determined by reasonable inspection whether or not any particular cattle were afflicted with the disease in question, and it was therefore unnecessary to go to the extent of placing an absolute embargo upon such cattle during certain portions of the year.

The distinction between the *Husen* case and the case at bar is made plain by later decisions of the United States Supreme Court upholding quarantine orders even in the case of animals exposed to or inflicted with disease.

Thus in the case of *Rasmussen v. Idaho,* 181 U. S. 198, it appeared that the legislature of Idaho on March 13, 1899, had passed an act providing that whenever the governor had reason to believe that scab or any other infectious disease of sheep had become epidemic in certain localities in any other state or territory, or that conditions existed that rendered sheep likely to convey

disease, he must thereupon, by proclamation, designate such localities and prohibit the importation from them of any sheep into the state, except under such restrictions as after consultation with the state sheep inspector he might deem proper. On April 12, 1899, the governor of Idaho issued his proclamation which, after reciting that he had received information to the effect that scab or scabies was epidemic among sheep in Cache and Boxelder counties, Utah, and in Elco county, Nevada, and that it was known that sheep from such districts were annually imported into the State of Idaho, and if so imported would spread infection and disease on the ranges and among the sheep of Idaho, prohibited the importation, driving or moving into the state of Idaho of all sheep held, herded, or ranged within said counties of Cache and Boxelder, in the state of Utah, and the county of Elco, Nevada, for a period of sixty days from and after the date of the proclamation, and thereafter only upon compliance with the Idaho laws regarding the inspection and dipping of sheep. The defendant was prosecuted for violation of this statute and accompanying proclamation, and his conviction was sustained by the supreme court of Idaho in *State v. Rasmussen*, 7 Idaho 1. From the judgment of the state supreme court, a writ of error was sued out to this court. In holding the quarantine order of the governor of Idaho to be a reasonable and proper exercise of the police power of the state, the United States Supreme Court, speaking through Justice Brewer, after reviewing and distinguishing the *Husen* case, said in part (pp. 201-202):

"In the case before us the statute makes no absolute prohibition of the introduction of sheep, but authorizes

the governor to investigate the condition of sheep in any locality, and, if found to be subject to the scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the state as shall seem to him, after conference with the state sheep inspector, to be necessary. The executive acted on the authority thus conferred, and, after consultation with the state sheep inspector and examination of the matter, found that the scab was epidemic in certain localities in Utah and Nevada, and that if sheep from those localities were moved therefrom into Idaho they would spread infection and disease among the sheep of the state, and thereupon forbade the introduction of sheep from such localities for the space of sixty days. It will be perceived that this is not a continuous act, operating year after year irrespective of any examination as to the actual facts, but is one contemplating in every case investigation by the chief executive of the state before any order of restraint is issued. Whether such restraint shall be total or limited, and for what length of time, are matters to be determined by him upon full consideration of the condition of the sheep in the localities supposed to be affected. The statute was an act of the State of Idaho contemplating solely the protection of its own sheep from the introduction among them of an infectious disease, and providing for only such restraints upon the introduction of sheep from other states as in the judgment of the state was absolutely necessary to prevent the spread of disease. The act, therefore, is very different from the one presented in *Railroad Co. v. Husen, supra,* and is fairly to be considered a purely quarantine act, and containing within its provisions nothing which is not reasonably appropriate therefor."

In the case of *Smith v. Railroad Company,* 181 U. S. 248, it appeared that a statute of the State of Texas provided that it should be the duty of the livestock sanitary commission, consisting of three members appointed by the governor, to protect the domestic animals of the state from contagious or infectious diseases, whether such diseases existed in Texas or elsewhere, and for that pur-

pose it was authorized to establish, maintain and enforce such quarantine lines as they might deem necessary. The governor of the State of Texas, pursuant to this section, issued a proclamation on June 5, 1897, reciting that the livestock sanitary commission of the State of Texas had reason to believe that charbon and anthrax had or was liable to break out in the State of Louisiana, and providing that from that time on until November 15, 1897, no cattle, mules or horses should be transported or driven into the State of Texas from the State of Louisiana. While this quarantine order was in force, a shipment of cattle was made from Louisiana to Texas, and upon arrival the railroad company refused to deliver the cattle, although the freight charges were duly tendered, but returned the cattle to the original point of shipment in Louisiana and there tendered them to the shippers, who refused to receive them, after which after proper advertising they were sold and the proceeds tendered to the owners, which was also refused. An action was brought by the consignees against the railroad company for the conversion of the cattle, and from a judgment by the court of appeals in favor of the railroad company, a writ of error was taken to the Supreme Court of the United States, which court in an exhaustive opinion written by Mr. Justice McKenna, held that the quarantine order was a reasonable and valid police regulation of the State of Texas, and that therefore the railroad company was justified in refusing to deliver the cattle shipped from Louisiana in violation of the quarantine order and was not liable for the conversion of the cattle. After reviewing many cases theretofore decided by this court, including

the *Husen* case above referred to, Mr. Justice McKenna, speaking for the court, said (pp. 255-258):

"The exclusion in the case at bar is not as complete as in the cited cases. That, however, makes no difference if it is within their principle, and their principle does not depend upon the number of States which are embraced in the exclusion. It depends upon whether the police power of the State has been exerted beyond its province—exerted to regulate interstate commerce—exerted to exclude, without discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine.* The words in italics express an important qualification. *The prevention of disease is the essence of a quarantine law. Such law is directed not only to the actually diseased but to what has become exposed to disease.*" (Last italics ours.)

* * * * * * * *

"What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained. *Henderson v. Mayor of New York,* and *Chy Lung v. Freeman, supra.* But we are not now put to any inquiry of that kind. The good faith and sincerity of the Texas officers cannot be doubted, and the statutes under which they acted cannot be justifiably complained of. The regulations prescribed are complained of, but are they not reasonably adaptive to the purpose of the statutes—not in excess of it? Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against. As the Supreme Court of Tennessee said: 'The necessities of such cases often require prompt action. If too long delayed the end to be attained by the exercise of the power to declare a quarantine may be defeated and irreparable injury done.'

"It is urged that it does not appear that the action of the Live Stock Sanitary Commission was taken on sufficient information. It does not appear that it was

not, and the presumption which the law attaches to the acts of public officers must obtain and prevail."

The language of the court last quoted is peculiarly apt in the case at bar. The undoubted right of the states to adopt reasonable quarantine regulations to protect their property from pests and diseases is recognized, not only in this case, but in the *Husen* case relied upon by the railroad. What constitutes a reasonable quarantine regulation "cannot be the same for cattle as for persons" and necessarily cannot be the same for cattle which may readily and effectively be inspected, as for baled alfalfa hay infected with microscopic larvae and eggs. Such quarantine regulations, we submit, in the language of Justice McKenna "must vary with the nature of the disease to be defended against." The evidence conclusively showed in the case at bar that the alfalfa weevil was a destructive pest, multiplied rapidly as a result of eggs laid upon the alfalfa stalk, and that these eggs and the larvae, as well as the beetles themselves, were likely to be carried in the bales of alfalfa and distributed along the railroad right-of-way, resulting in the infestation of the adjacent alfalfa crops. It was further shown that no method existed for the eradication of the pest where it existed in this country, and that a district once infected was always infected. It was further shown beyond question that it was utterly impracticable to determine by inspection whether or not a consignment of baled alfalfa hay was or was not infected with the weevil and its eggs, and that consequently the only effective quarantine was a quarantine against products of the infected district, since it was impracticable and impossible to inspect each bale

of hay to ascertain the presence or absence of the beetle, its larvae or eggs.

We would also call to the Court's attention the case of *Compagnie Francaise De Navigation A Vapeur v. Board of Health,* 186 U. S. 380, upholding a quarantine regulation of the state of Louisiana excluding healthy persons from a locality infested with a contagious or infectious disease.

Counsel for the railroad also rely upon the case of *Schollenberger v. Commonwealth of Pennsylvania,* 171 U. S. 1. In that case it was held beyond the power of a state absolutely to prohibit the importation into the state of an article of food, which, though subject to adulteration, was pure and wholesome in its natural state, simply because "the inspection or analysis of the article to be imported is *somewhat* difficult and burdensome." That is most certainly true. A state would have no right absolutely to ban any given article of food simply because a dishonest manufacturer might resort to fraud and deception in its manufacture or preparation, particularly where such impurity could be ascertained by reasonable inspection. The manufacturer is presumed to be honest. Consequently the food product is presumed to be pure until the contrary is shown. But that is not the case here. The area included in the quarantine order has been found to be infected with the weevil. We must presume, therefore, that alfalfa originating in this area is infected with the weevil, rather than that it is not. Inspection is shown to be impossible—at least prohibitive. The case cited, we submit, is not in point.

For the reasons urged, we respectfully submit that the quarantine order in question is a reasonable and valid exercise of the police power of the state, and not an unreasonable interference with interstate commerce.

NEITHER THE QUARANTINE ORDER NOR THE STATE LAW PURSUANT TO WHICH IT WAS PROMULGATED IS INVALID AS AN INVASION OF A FIELD ALREADY OCCUPIED BY FEDERAL LEGISLATION.

It is urged that since Congress has enacted a law for the protection of trees, shrubs and plants (Act of August 20, 1912, Chapter 308, 37 Stat. at Large 318, Sections 8752-8764, U. S. Compiled Statutes 1916) the police power of the states to enact similar legislation has been superseded.

We respectfully submit, however, that the federal act does not conflict with the state law and that in any event the Act of Congress referred to merely delegates to the secretary of agriculture the right to quarantine any district which he finds, after a public hearing, to be infected by a dangerous plant disease or insect infestation and that until the secretary of agriculture has actually caused such a public hearing to be had and fixed, or refuses to fix quarantine lines as contemplated by section 8 of the Act, it cannot be said that Congress has occupied the field covered by the state quarantine law.

An examination of section 8760 U. S. Compiled Statutes will show that Congress has not fixed quarantine lines or even prohibited the transportation of infected plant products from one infested district to another, but has merely delegated to the secretary of agriculture the

authority to quarantine any district when he shall determine, after a public hearing, that a dangerous plant disease or insect infestation new or not theretofore widely prevalent throughout the United States, exists within such district. In other words, Congress has merely delegated to an executive officer the power to legislate by the promulgation of a quarantine order upon which it itself has the undoubted authority to legislate. Clearly the fact that Congress has merely delegated to an executive officer the power which it itself has to enact police regulations affecting the welfare of the several states does not mean that it has deprived the several states of the right to protect their own agricultural industries by proper police regulations of their own, at least until the delegated power has been actively exercised by the executive officer.

In the case of *Missouri Pacific Railway Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, the Supreme Court of Kansas, in a proceeding instituted by the mill company, issued a peremptory writ of mandamus compelling the Railway Company to restore, resume and make transfer of cars between its lines and the mills and elevators of the mill company. On error to this Court it was urged by the railway company that the railroad tracks, spurs, switches, terminals, etc., of the railway company were instrumentalities of interstate commerce, and as such, the regulation and control thereof was vested exclusively in the Interstate Commerce Commission, but in affirming the judgment of the state court, Justice Brewer, speaking for the court said:

"On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Com-

mission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undisturbed. *In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens.* Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. *Until specific action by Congress or the Commission the control of the state over these incidental matters remains undisturbed.*" (Italics ours.)

In the case of the *Railway Company v. Harris,* 234 U. S. 412-417, it was again said:

"It is of course settled that when Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, state laws upon the same subject are superseded. *Northern Pacific Ry. v. Washington,* 222 U. S. 370, 378; *Erie Railroad Co. v. New York,* decided May 25, 1914, 233 U. S. 671. But it is equally well settled that the mere creation of the Interstate Commerce Commission, and the grant to it of a measure of control over interstate commerce, does not of itself, and in the absence of specific action by the Commis-

sion or by Congress itself, interfere with the authority of the States to establish regulations conducive to the welfare and convenience of their citizens, even though interstate commerce be thereby incidentally affected, so long as it be not directly burdened or interfered with. *Missouri Pacific Ry. v. Larabee Mills,* 211 U. S. 612, 623; *Southern Ry. Co. v. Reid,* 222 U. S. 424, 437."

To the same effect is the case of *Atlantic Coast Line R. Co. v. Commonwealth, etc.,* 136 Va. 134, 118 S. E. 257.

It is argued by the railroad that the act of Congress makes it obligatory upon the secretary of agriculture to establish a quarantine "when he shall determine that such a quarantine is necessary."

But he is merely authorized *and not required* to have a public or other hearing for the purpose of determining whether a particular district should or should not be quarantined.

Yet even were the duty expressly imposed upon to the secretary to cause such hearings to be had and adopt the necessary quarantine measures, there could be no other or greater duty imposed upon this officer to ascertain the facts and adopt the proper regulations than was already imposed upon Congress itself before the law was enacted. We respectfully insist that no more imperative duty to pass needed legislation can be delegated to any officer, board or tribunal than already exists in the delegating legislative body itself, and failure on the part of Congress to act has never been held to imply a Congressional finding that offending legislation of the several states was unnecessary. The secretary would not be required to fix quarantine lines if he deemed the state regulations sufficiently effective.

But we respectfully submit that the federal law does not, and was not intended to, cover the entire field of quarantining districts infested with injurious plant diseases and insect pests. Section 8760 U. S. Compiled Statutes, authorizes the secretary of agriculture to establish such quarantine when he finds that any particular plant disease or insect infestation is "new to or *not theretofore widely prevalent or distributed within and throughout the United States.*" It might well be urged that in the present case, for instance, the alfalfa weevil was widely prevalent in the United States since it exists in Utah, Colorado, Idaho, Oregon and Nevada, and for that reason the secretary of Agriculture would be powerless to establish the quarantine provided for by the act, and were the federal act adjudged to be exclusive, the state of Washington, which is now free from the pest would be powerless to prevent infestation of its 300,000 acres of alfalfa land by appropriate quarantine measures. Under the federal law it is apparent that if all states save one were infected, the one free from infection would be powerless to protect itself. This, we submit, could not have been the purpose of Congress in enacting this legislation.

"The intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of congress fairly interpreted is in actual conflict with the law of the state. This principle has had abundant illustration. *Chicago etc. Ry. Co. v. Solan,* 169 U. S. 133; *Missouri, Kansas & Texas Ry. Co. v. Haber,* 169 U. S. 613; *Reid v. Colorado,* 187 U. S. 137; *Pennsylvania R. R. Co. v. Hughes,* 191 U. S. 477; *Crossman v. Lurman,* 192 U. S. 189; *Asbell v.*

Kansas, 209 U. S. 251; *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370, 379; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 442."

Savage v. Jones, 225 U. S. 501, 533-4.

"If, reading the federal act as a whole, there were room for doubt, two established rules of construction would lead us to resolve the doubt in favor of sustaining the validity of the state law. First: The intent to supersede the exercise by a state of its police powers is not to be implied unless the act of Congress fairly interpreted *is in actual conflict with the law of the state. Savage v. Jones*, 225 U. S. 501, 533; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 623. Second: Where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other of which its constitutionality would be doubtful, the former construction should be adopted. *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 422; *Knights Templars' Indemnity Co. v. Jarman*, 187 U. S. 197, 205." (Italics ours.)

Carey v. South Dakota, 250 U. S. 118, 122.

In the case of *Reid v. Colorado*, 187 U. S. 137, it was held that the Animal Industry Act of May, 29, 1884, 23 Stat. 31, c. 60, which provided for the ascertainment through the Agricultural Department of the condition of domestic animals of the United States, the cause of contagious, infectious or communicable diseases affecting them, the best methods of treating, transporting and caring for animals, the means to be adopted for the suppression of such diseases, and provided, further, that the secretary of the treasury, was required to establish such regulations concerning the exportation and transportation of live stock as the results of such investigation should require, and the transportation of infected live stock from one state to another was expressly forbidden, did not cover the whole subject of the transportation of

live stock from one state to another so as to prevent the state of Colorado from passing a valid act prohibiting the bringing of cattle into that state from certain districts of the United States at certain times of the year except under certain conditions. The Court said (p. 148):

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot v. Davenport*, 22 How. 227, 243."

To the same effect is the later case of *Asbell v. Kansas*, 209 U. S. 251.

On pages 39-40 of their brief, counsel for the railroad cite and quote extensively from the opinion of the Missouri Court of Appeals in the case of *State v. R. Co.*, 200 Mo. App. 109, 206 S. W. 419. Especial attention is called to the fact that in that case the court either overlooked or ignored the decision of this court in the case of *Missouri Pacific Railway v. Larabee Mills*, 211 U. S. 612. Moreover, the federal statute under consideration in that case, unlike the statute involved here, gave the Secretary of Agriculture power to quarantine any part of the United States in which the disease was found, irrespective of whether it was or was not widely prevalent throughout the United States.

Nor are we able to find anything in the supreme court cases cited by counsel on pages 28-30 of their brief which tend in any way either to overrule or modify the doctrine

announced in the case of *Missouri Pacific Railway v. Larabee Mills*, 211 U. S. 612.

For the reasons urged, we respectfully submit that neither Chapter 105, Laws of 1921, nor the quarantine order in question is invalid as an invasion of a field already exclusively occupied by federal legislation for the reasons (1) that the Act of Congress purports to clothe the secretary of agriculture with authority to make regulations covering only a limited and not the whole field, and (2) that the right of a state to protect itself by appropriate quarantine measures can in no event be superseded until either Congress or the secretary of agriculture has, after an appropriate hearing, elected to establish or not to establish an appropriate quarantine.

CONCLUSION.

The evidence in this case, we submit, shows the menace to the alfalfa districts of the state of Washington to be a very real one, and further that the provisions of Quarantine Order No. 4 are no more drastic than the menace of the alfalfa weevil to the agricultural districts of the state demands. For that reason we respectfully submit that the judgment of the state court should be affirmed.

JOHN H. DUNBAR,

R. G. SHARPE,

Attorneys for Defendant in Error.

Washington Quarantine Law held v
as interference with inter state Com

SUPREME COURT OF THE UNITED STATES.

No. 187.—October Term, 1925.

Oregon-Washington Railroad & Navigation Company, Plaintiff in Error, *vs.* State of Washington.	In Error to the Supreme Court of the State of Washington.

[March 1, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This was a bill of complaint filed by the State of Washington in the Superior Court of Thurston County of that State against the defendant, the Oregon-Washington Railway & Navigation Company, an interstate common carrier in the States of Idaho, Oregon and Washington. The bill averred that there existed in the areas of the States of Utah, Idaho, Wyoming, Oregon and Nevada, an injurious insect popularly called the alfalfa weevil, and scientifically known as the phytonomus posticus, which fed upon the leaves and foliage of the alfalfa plant, to the great damage of the crop; that the insect multiplied rapidly and was propagated by means of eggs deposited by the female insect upon the leaves and stalks of the plant; that when the hay was cured, the eggs clung to and remained dormant upon the hay and even in the meal made from it; that the eggs and live weevils were likely to be carried to points where hay was transported, infecting the growing crop there; that when the hay was carried in common box cars the eggs and live weevils were likely to be shaken out and distributed along the route and communicated to the argicultural lands adjacent to the route; that a proper inspection to ascertain the presence of the eggs or weevils would require the tearing open of every bale of hay and sack of meal, involving a prohibitive cost of inspection, and that the only practical method of preventing the spread into uninfested districts was to prohibit the transportation of hay or meal from the district in which the weevil existed; that the pest is new to, and not generally distributed within, the State of Wash-

ington; that there is no known method of ridding a district infested of the pest; that subsequent to June 8, 1921, and prior to September 17, 1921, information was received by the Washington Director of Agriculture that there was a probability of the introduction of the weevil into the State across its boundaries; that he thereupon investigated thoroughly the insect and the areas where such pests existed and ascertained it to be in the whole of the State of Utah, all portions of the State of Idaho lying south of Idaho County, the counties of Uinta and Lincoln in the State of Wyoming, the county of Delta in the State of Colorado, the counties of Malheur and Baker in the State of Oregon, and the county of Washoe in the State of Nevada; that he, with the approval of the Governor of the State, thereupon, on or about September 17, 1921, made and promulgated a quarantine regulation and order under the terms of which he declared a quarantine against all of the above described areas and forbade the importation into Washington of alfalfa hay and alfalfa meal, except in sealed containers, and fixed the boundaries of the quarantine. The bill further averred that the defendant, knowing of the proclamation, and in violation thereof, had caused to be shipped into Washington, in common box cars, and not in sealed containers, approximately 100 cars of alfalfa hay, consigned from various points in the State of Idaho lying south of Idaho County and through the State of Oregon and into the State of Washington, in direct violation of the quarantine order; and that unless enjoined, the defendant would continue to make these shipments from such quarantined area in the State of Idaho into and through the State of Washington; that large quantities of alfalfa were grown in the eastern and central portions of Washington and adjacent to the railroad lines of the defendant and other railroads over which such shipments of alfalfa hay were shipped and were likely to be shipped in the future, unless an injunction was granted, to the great and irreparable damage of the citizens of Washington growing alfalfa therein. A temporary injunction was issued, and then a demurrer was filed by the defendants. The demurrer was overruled. An answer was filed and in each of the pleadings was set out the claim by the defendant that the action and proclamation of the Director of Agriculture and the Governor, and chapter 105 of the Laws of Washington of 1921, under which they acted, were in

contravention of the interstate commerce clause of the Federal Constitution, and in conflict with an act of Congress.

At the hearing there was evidence on behalf of the State that the Oregon-Washington and Northern Pacific Railroads ran through the parts of the State where the alfalfa was raised; that the weevil had first appeared in Utah in 1904 in Salt Lake City, and that it had spread about 10 miles a year; that it came from Russia and Southern Europe; that it would be impossible to adopt any method of inspection of alfalfa hay to keep out the weevil not prohibitory in cost; that in Europe the weevil is not a serious pest, because its natural enemies exist there and they keep it down; that the U. S. Government had attempted to introduce parasites, but that it takes a long time to secure a natural check from such a method; that methods by using poison sprays, by burning and in other ways had been used to attack the pest, but that no one method has been entirely successful; that there is no practical way of eliminating the beetles completely if the field once becomes infected, and the continuance of the pest will be indefinite; that the great danger of spreading the infection is through the transfer of hay from one section to another. In behalf of the defendant it was testified that the prevalent opinion in regard to the spread of the alfalfa weevil and the damage it was doing was vastly exaggerated; that the spread of the weevil from hay shipped in the cars, through the State of Washington was decidedly improbable. The Superior Court made the temporary injunction permanent and the Supreme Court of Washington affirmed the decree. This is a writ of error under section 237 of the Judicial Code to that decree.

By chapter 105 of the Washington Session Laws of 1921, p. 308, the Director is given the power and duty, with the approval of the Governor, to establish and maintain quarantine needed to keep out of the State contagion or infestation by disease of trees and plants and injurious insects or other pests, to institute an inspection to prevent any infected articles from coming in except upon a certificate of investigation by such Director, or in his name by an inspector. Upon information received by the Director, of the existence of any infectious plant, disease, insect or weed pest, new to or not generally distributed within the State, dangerous to the plant industry of the State, he is required to proceed to investigate the

same, and then enforce necessary quarantine. There is a provision for punishment of a fine or not less than $100, or more than $1,000, or by both such fine and imprisonment, for violation of the act.

In the absence of any action taken by Congress on the subject matter, it is well settled that a state in the exercise of its police power may establish quarantines against human beings or animals or plants, the coming in of which may expose the inhabitants or the stock or the trees, plants or growing crops to disease, injury or destruction thereby, and this in spite of the fact that they necessarily affect interstate commerce.

Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, speaking of inspection laws, says at p. 203:

"They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

Again, he says at p. 205:

"The acts of Congress, passed in 1796 and 1799, empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a State, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true, that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations, or among the States; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State, to provide for the health of its citizens. But, as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by the laws of the United States, made for the regulation of commerce, Congress, in that spirit of harmony and conciliation, which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making pro-

visions in aid of those of the States. But, in making these provisions, the opinion is unequivocally manifested, that Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce."

This Court in the *Minnesota Rate Cases,* 230 U. S. 352, 406, said:

"Quarantine regulations are essential measures of protection which the States are free to adopt when they do not come into conflict with Federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the States and has repeatedly acquiesced in the enforcement of state laws. . . . Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health (*Hannibal & St. Joseph Railroad Co.* v. *Husen,* 95 U. S. 465, 472, 473); but the power of the State to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question. *Morgan's &c. S. S. Co.* v. *Louisiana,* 118 U. S. 455; *Missouri, Kansas & Texas Ry. Co.* v. *Haber,* 169 U. S. 613; *Louisiana* v. *Texas,* 176 U. S. 1; *Rasmussen* v. *Idaho,* 181 U. S. 198; *Compagnie Francaise, etc.* v. *Board of Health,* 186 U. S. 380; *Reid* v. *Colorado,* 187 U. S. 137, 138; *Asbell* v. *Kansas,* 209 U. S. 251."

Counsel for the company argues that the case of *Railroad Co.* v. *Husen,* 95 U. S. 465, is an authority to show that this law as carried out by the proclamation goes too far, in that it forbids importations from certain parts of Idaho, of Utah, of Nevada, of alfalfa hay, without qualification and without any limit of time. The *Husen* case is to be distinguished from the other cases cited, in that the Missouri statute there held invalid was found by the Court not to be a quarantine provision at all. It forbade the importation into Missouri for eight months of the year of any Texas, Mexican or Indian cattle without regard to whether the cattle were diseased or not, and without regard to the question whether they came from a part of the country where they had been exposed to contagion. We think that here the investigation required by the Washington law and the investigation actually made into the existence of this pest and its geographical location makes the

law a real quarantine law, and not a mere inhibition against importation of alfalfa from a large part of the country without regard to the conditions which might make its importation dangerous.

The second objection to the validity of this Washington law and the action of the state officers, however, is more formidable. Under the language used in *Gibbons* v. *Ogden, supra,* and the *Minnesota Rate Cases, supra,* the exercise of the police power of quarantine, in spite of its interfering with interstate commerce, is permissible under the Interstate Commerce clause of the Federal Constitution "subject to the paramount authority of Congress if it decides to assume control."

By the Act of Congress of August 20, 1912, 37 Stat. 315, c. 308, as amended by the Act of March 4, 1917, 39 Stat. 1165, c. 179, it is made unlawful to import or offer for entry into the United States, any nursery stock unless permit had been issued by the Secretary of Agriculture under regulations prescribed by him.

Section 2 makes it the duty of the Secretary of the Treasury to notify the Secretary of Agriculture of the arrival of any nursery stock and forbids the shipment from one State or territory or district of the United States into another of any nursery stock imported into the United States without notifying the Secretary of Agriculture, or at his direction, the proper state, territorial or district official to which the nursery stock was destined. Whenever the Secretary of Agriculture shall determine that such nursery stock may result in the entry of plant diseases or insect pests, he shall promulgate his determination of this, but shall give due notice and a public hearing at which any interested party might appear before the promulgation.

Section 7 provides that whenever, in order to prevent the introduction into the United States of any tree, plant or fruit disease or any injurious insect, not theretofore widely prevalent or distributed, within and through the United States, the Secretary shall determine that it was necessary to forbid the importation into the United States, he shall promulgate such determination, and such importations are thereafter prohibited.

Section 8 of the Act was amended by the Agricultural Appropriation Act of March 4, 1917, and reads as follows:

"Sec. 8. That the Secretary of Agriculture is authorized and directed to quarantine any State, Territory, or District of the

United States, or any portion thereof, when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and throughout the United States; and the Secretary of Agriculture is directed to give notice of the establishment of such quarantine to common carriers doing business in or through such quarantined area, and shall publish in such newspapers in the quarantined area as he shall select notice of the establishment of quarantine. That no person shall ship or offer for shipment to any common carrier, nor shall any common carrier receive for transportation or transport, nor shall any person carry or transport from any quarantined State or Territory or District of the United States, or from any quarantined portion thereof, into or through any other State or Territory or District, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine except as hereinafter provided. That it shall be unlawful to move, or allow to be moved, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from any quarantined State or Territory or District of the United States or quarantined portion thereof, into or through any other State or Territory or District, in manner or method or under conditions other than those prescribed by the Secretary of Agriculture. That it shall be the duty of the Secretary of Agriculture, when the public interests will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, and method and manner of delivery and shipment of the class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from a quarantined State or Territory or District of the United States, or quarantined portion thereof, into or through any other State or Territory or District; and the Secretary of Agriculture shall give notice of such rules and regulations as hereinbefore provided in this section for the notice of the establishment of quarantine: *Provided*, That before the Secretary of Agriculture shall

promulgate his determination that it is necessary to quarantine any State, Territory, or District of the United States, or portion thereof, under the authority given in this section, he shall, after due notice to interested parties, give a public hearing under such rules and regulations as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney."

Section 10 of the Act provides that any person who shall violate any provisions of the Act, or who shall forge, counterfeit or destroy any certificate provided for in the Act or in the regulations of the Secretary of Agriculture shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both such fine and imprisonment, in the discretion of the court. It is made the duty of the United States attorneys diligently to prosecute any violations of this act which are brought to their attention by the Secretary of Agriculture, or which come to their notice by other means, and that for the purpose of carrying out the provisions of the act, the Secretary of Agriculture shall appoint from existing Bureaus in his office, a commission of five members employed therein.

It is impossible to read this statute and consider its scope without attributing to Congress the intention to take over to the Agricultural Department of the Federal Government the care of the horticulture and agriculture of the states, so far as these may be affected injuriously by the transportation in foreign and interstate commerce of anything which by reason of its character can convey disease to and injure trees, plants or crops. All the sections look to a complete provision for quarantine against importation into the country and quarantine as between the states under the direction and supervision of the Secretary of Agriculture.

The courts of Washington and the counsel for the State rely on the decision of this Court in *Reid* v. *Colorado*, 187 U. S. 137, as an authority to sustain the validity of the Washington law before us. The *Reid* case involved the constitutionality of a conviction of Reid for violation of an Act of Colorado to prevent the introduction of infectious or contagious diseases among the cattle and horses of that State. The law made it unlawful for any person, association or corporation to bring or drive any cattle or horses, suffering from such disease, or which had within ninety days prior

thereto been herded or brought into contact with any other cattle or horses, suffering from such disease, into the State, unless a certificate or bill of health could be produced from the state veterinary sanitary board that the cattle and horses were free from all infectious or contagious diseases. It was urged that it was inconsistent with the Federal Animal Industry Act. This directed a study of contagious and communicable diseases of animals and the best method of treating them by the Federal Commissioner of Agriculture, to be certified to the executive authority of each state and the cooperation of such authority was invited. If the authorities of the state adopted the plans and methods advised by the Department, or if such authorities adopted measures of their own which the Department approved, then the money appropriated by Congress was to be used in conducting investigations and in aiding such disinfection and quarantine measures as might be necessary to prevent the spread of the diseases in question from one state or territory into another. This Court held that Congress did not intend by the Act to override the power of the states to care for the safety of the property of their people, because it did not undertake to invest any officer or agent of the Department with authority to go into a state and without its assent take charge of the work of suppressing or extirpating contagious, infectious or communicable diseases there prevailing, or to inspect cattle or give a certificate of freedom from disease for cattle of superior authority to state certificates.

It is evident that the Federal statute under consideration in the *Reid* case was an effort to induce the states to cooperate with the general Government in measures to suppress the spread of disease without at all interfering with the action of the state in quarantining or taking any other measures to extirpate it or prevent its spread. Indeed the Commissioner of Agriculture in that case was to aid the state authorities in their quarantine and other measures from federal appropriation. The act we are considering is very different. It makes no reference whatever to cooperation with state authorities. It proposes the independent exercise of Federal authority with reference to quarantine in interstate commerce. It covers the whole field so far as the spread of the plant disease by interstate transportation can be affected and restrained. With such authority vested in the Secretary of Agri-

culture, and with such duty imposed upon him, the state laws of quarantine that affect interstate commerce and thus Federal law can not stand together. The relief sought to protect the different states, in so far as it depends on the regulation of interstate commerce, must be obtained through application to the Secretary of Agriculture.

In the relation of the states to the regulation of interstate commerce by Congress there are two fields. There is one in which the state can not interfere at all, even in the silence of Congress. In the other, and this is the one in which the legitimate exercise of the state's police power brings it into contact with interstate commerce so as to affect that commerce, the state may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action.

Cases of the latter type are the *Southern Railway Company* v. Reid, 222 U. S. 424; *Northern Pacific Railway Company* v. *Washington,* 222 U. S. 370, 378; *C. R. I. & P. Ry. Co.* v. *Elevator Company,* 226 U. S. 426, 435; *Erie Railroad Company* v. *New York,* 233 U. S. 671, 681; and *Missouri Pacific Railroad Company* v. *Stroud,* 267 U. S. 404.

Some stress is laid by the counsel of the State on the case of *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Company,* 211 U. S. 612. There the question was whether a state court might by mandamus compel a railroad company, under its common law obligation as a common carrier, to afford equal local switching service to its shippers, notwithstanding the fact that the cars in regard to which the service was claimed were two-thirds of them in interstate commerce and one-third in intrastate commerce. The contention was that the enactment of the Interstate Commerce law put such switching wholly in control of the Interstate Commerce Commission. The case was one on the border line, three judges dissenting. The number of cases decided since that case and above cited have made it clear that the rule, as it always had been, was not intended in that case to be departed from. That rule is that there is a field in which the local interests of states touch so closely upon interstate commerce that in the silence of Congress on the subject, the states may exercise their police powers and local switchings as in that case, and quarantine as in the case before us, are in that field. But

when Congress has acted and occupied the field, as it has here, the power of the states to act is prevented or suspended.

It follows that pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject can not be given application. It is suggested that the states may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the states to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that can not be given to the federal statute. The obligation to act without respect to the states is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the federal law in force, state action is illegal and unwarranted.

The decree of the Supreme Court of Washington is

Reversed.

Mr. Justice McREYNOLDS and Mr. Justice SUTHERLAND, dissenting.

We cannot think Congress intended that the Act of March 4, 1917, without more should deprive the States of power to protect themselves against threatened disaster like the one disclosed by this record.

If the Secretary of Agriculture had taken some affirmative action the problem would be a very different one. Congress could have exerted all the power which this statute delegated to him by positive and direct enactment. If it had said nothing whatever certainly the State could have resorted to the quarantine; and this same right, we think, should be recognized when its agent has done nothing.

It is a serious thing to paralyze the efforts of a State to protect her people against impending calamity and leave them to the slow charity of a far-off and perhaps supine federal bureau. No such purpose should be attributed to Congress unless indicated beyond reasonable doubt.